TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 44

JOHN KEDROFF AND BENJAMIN FEDCHENKOFF, AS ARCHBISHOP, ETC., APPELLANTS,

vs.

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

FILED MAY 3, 1951.

PROBABLE JURISDICTION NOTED JUNE 4, 1951.

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record on appeal to Court of Appeals of New York	1	1
Statement under Rule 234 (omitted in printing)	1	
Notice of appeal to Appellate Division (omitted in printing)	2	
Record from Supreme Court of New York, County of New York	3	1
Summons (omitted in printing)	3	
Amended complaint	4	1
Answer of defendant Kedroff	6	2
Amended answer of defendant Fedchenkoff	7	2
Note re judgment appealed from	10	4
Transcript of evidence	13	5
Appearances	13	5
Testimony of Archbishop Leonty Turkevich	17	6
George P. Fedotov	77	40
Archbishop Leonty Turkevich (resumed)	115	59
Colloquy between court and counsel	130	69
Testimony of George P. Fedotov (recalled)	163	80
Benjamin Fedchenkoff	203	112
George P. Fedotov (resumed)	240	139
Joseph Pishtey	265	158

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUG. 15, 1951.

—6593

	Original	Print
Record from Supreme Court of New York, County of New York—Continued		
Transcript of evidence—Continued		
Colloquy between court and counsel	267	160
Testimony of Gregory Tchukov	271	162
Plaintiff's Exhibit 1—Act incorporating St. Nicholas Cathedral	281	169
Plaintiff's Exhibit 3—Minutes of first meeting of Cathedral trustees	284	171
Plaintiff's Exhibit 4—Judgment on appeal in Kedrovsky v. Rojdesvensky	294	175
Note re Plaintiff's Exhibit 5	296	176
Plaintiff's Exhibit 5-A—Ukase of November 20, 1920	297	177
Plaintiff's Exhibit 6—Extract from minutes of Sobor held at Detroit, April 2-4, 1924	301	180
Note re Plaintiff's Exhibit 6-A	313	189
Plaintiff's Exhibit 7—Proposed order in Kedrovsky v. Rojdesvensky	314	189
Plaintiff's Exhibit 7-A—Memorandum on settlement of order	318	192
Plaintiff's Exhibit 7-C—Affidavit of Ralph Montgomery Arkush	320	193
Plaintiff's Exhibit 8—Docket entries in Kedrovsky v. St. Nicholas Cathedral	335	204
Plaintiff's Exhibit 11—Deed from St. Nicholas Church to St. Nicholas Cathedral	338	204
Notes re Exhibits 13, 14, and 15	343	206
Plaintiff's Exhibit 15-A—Declaration by Metropolitan Sergius	343	207
Plaintiff's Exhibit 15-B—Statement of Stalin	345	208
Plaintiff's Exhibit 16—Letter of Metropolitan Council in regard to ukase of February 16, 1945	346	209
Plaintiff's Exhibit 17—Cablegram, January 21, 1947, from Metropolitan Theophilus to Patriarch Alexy	361	219
Plaintiff's Exhibit 17-A—Cablegram received January 18, 1947, by Metropolitan Theophilus from Patriarch Alexy	362	220
Plaintiff's Exhibit 17-B—Cablegram January 31, 1947 from Metropolitan Theophilus to the Patriarch at Moscow	363	221
Note re Plaintiff's Exhibit 18, 18-A, and 19	363	221
Defendant's Exhibit A—Resolution of Sobor at Cleveland in 1946	364	221
Note re Defendant's Exhibit B	366	223
Defendant's Exhibit C—Ukase of the Moscow Patriarchate	366	223
Defendant's Exhibit D—Ukase of February 16, 1945	372	227

	Original	Print
Record from Supreme Court of New York, County of New York—Continued		
Transcript of evidence—Continued		
Defendant's Exhibit F—Papers in regard to transfer of property of Russian Orthodox St. Nicholas Church in New York	375	229
Defendant's Exhibit G—Letterhead of Metropolitan Benjamin	400	236
Defendant's Exhibit H—Article from "The Living Church"	400	237
Defendant's Exhibit I—Memorandum on the status of the Russian Orthodox Church in America	407	242
Defendant's Exhibit J—Extract from memorandum of defendant's attorney	415	248
Opinion, Botein, J. (omitted in printing)	417	
NOTE: This opinion printed as Exhibit D to Jurisdictional Statement, pp. 126-132.		
Stipulation as to certain exhibits deemed marked for identification	426	250
Stipulation waiving printing of certain exhibits	428	251
Stipulation and order settling and filing case (omitted in printing)	429	
Notice of appeal to Court of Appeals (omitted in printing)	431	
Order of affirmance, Appellate Division (omitted in printing)	433	
Judgment of Appellate Division (omitted in printing)	435	
Opinions of the Appellate Division (omitted in printing)	436	
NOTE: These opinions printed as Exhibit C to Jurisdictional Statement, pp. 86-126.		
Stipulation waiving certification (omitted in printing)	490	
Clerk's certificate (omitted in printing)	491	
roceedings in Court of Appeals of New York	492	252
pinion, Conway, J.	492	253
oncurring opinion, Froessel, J.	524	284
ssenting opinion, Desmond, J.	526	286
emittitur	539	297
der denying motion for reargument and amending remittitur	542	298
der of Supreme Court making judgment of Court of Appeals judgment of that court (omitted in printing)	543	
dgment of Supreme Court on remittitur (omitted in printing)	545	
der allowing appeal	549	299
ition for appeal and assignment of errors	506	
ecipe for record (omitted in printing)	558	
nd on appeal (omitted in printing)	560	

	Original	Print
Counter praecipe for record (omitted in printing)	562	
Statement of points to be relied upon	572	304
Designation of parts of record to be printed (omitted in printing)	572	
Stipulation for omission of additional portions of record (omitted in printing)	576	
Order noting probable jurisdiction	580	304

[fols. 1-3]

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA,

Plaintiff,

against

JOHN KEDROFF,

Defendant.

[fol. 4] AMENDED COMPLAINT

The plaintiff, complaining of the defendant, by Ralph Montgomery Arkush, its attorney, alleges:

First.—The plaintiff at all of the times hereinafter mentioned was and still is a domestic corporation.

Second.—The plaintiff at all of the times hereinafter mentioned was and still is seized in fee and lawfully entitled to the possession of the premises known as Nos. 13-15 East 97th Street, Borough of Manhattan, City and State of New York, being more particularly bounded and described as follows, to wit:

(Description of the premises omitted in printing.)

[fol. 5] Third.—On or about May 15, 1944, the defendant without any color of authority or right, wrongfully entered upon said premises and has continued and now is in possession of said premises and wrongfully withholds possession of said premises from the plaintiff, and refuses to deliver possession of said premises to the plaintiff, although due demand therefor has been made on the defendant.

Wherefore the plaintiff demands judgment that it be adjudged the owner in fee of the real property hereinbefore described, and that possession of said premises be restored to the plaintiff and that the defendant, his agents, employees, attorneys and any and all persons claiming title or possession or any right of possession under, by or through the defendant, be removed and excluded from the possession of the premises, and that the plaintiff have such other and further relief as may seem just and proper.

and recover of the defendant the costs and disbursements of this action.

Ralph Montgomery Arkush, Attorney for Plaintiff, Office and Post Office Address, No. 15 Broad Street, Borough of Manhattan 5, New York.

(Verified by R. M. Arkush on April 26, 1945.)

[fol. 6] IN SUPREME COURT OF NEW YORK

ANSWER OF DEFENDANT KEDROFF

The defendant, for his answer to the amended complaint herein by his attorneys, Boyd & Holbrook, respectively shows to the Court and alleges:

1. The defendant denies that he has any knowledge or information sufficient to form a belief as to the allegations contained in Paragraph "First" of the amended complaint herein, and denies each and every allegation contained in Paragraphs "Second" and "Third" of the amended complaint herein.

Wherefore, the defendant prays judgment dismissing the complaint herein, together with costs and disbursements.

Boyd & Holbrook, Attorneys for Defendant, Office and P. O. Address, 60 Broadway, Borough of Manhattan, New York 4, New York.

(Verified by J. Kedroff on June 26, 1945.)

[fol. 7] IN SUPREME COURT OF NEW YORK

AMENDED ANSWER OF DEFENDANT FEDCHENKOFF

Defendant, Benjamin Fedchenkoff, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church, by Philip Adler, his attorney, for his amended answer to the amended complaint herein, alleges:

First.—Denies each and every allegation contained in paragraph "First" of the amended complaint, except that this defendant admits that plaintiff was incorporated on April 8th, 1925.

Second.—Denies each and every allegation contained in paragraphs "Second" and "Third" of the amended complaint except that this defendant admits that both defendants did not deliver to plaintiff possession of the premises specified in the amended complaint.

For a First Affirmative Defense This Defendant, Alleges:

Third.—At all times hereinafter mentioned, the Russian Orthodox Greek Catholic Church (also known as the Christian Orthodox Catholic Church of the Eastern Confession and the Russian Orthodox Church and hereafter referred to as the Russian Orthodox Church) was and still is an unincorporated religious association composed of many millions of members including those known as the clergy thereof, having certain territorial sub-divisions known as dioceses, one of which is the Diocese of North America and [fol. 8] the Aleutian Islands and having certain rules which have the force of contract among the members and subordinate organizations of said Church. Such rules provide for said Diocese of North America and the Aleutian Islands, a ... of administrative and ecclesiastical officer known as the Archbishop thereof, who, in association with others in a council, has full administrative authority thereof, under said rules, subject only to the Superior control of the Supreme Church Authorities located at Moscow in Russia and known as the Patriarch of Moscow and of all Russia and his Holy Synod having, by said rules, authority to appoint, suspend, or remove such Archbishop of said Diocese and fully to administer the same.

Fourth.—The defendant, Benjamin Fedchenkoff, on or about June 1934, was appointed, by the Supreme Church Authority of Russian Orthodox Church, to wit, the Patriarch of Moscow and all Russia and his Holy Synod as Archbishop of the Archdiocese of North America and the Aleutian Islands, of the Russian Orthodox Church and as such Archbishop is entitled, under the rules of said Church, to possess, occupy, and use Saint Nicholas Cathedral, the premises mentioned in the amended complaint, as his resi-

dence, as a place for holding religious services and other purposes related to his office, and as the official seat and headquarters for the administration of the affairs both temporal and spiritual of the said Archdiocese.

Fifth.—Among the properties of the Russian Orthodox Church and the American Diocese thereof, is the premises [fol. 9] known as 13 to 15 East 97th Street, in the City and County of New York, known as Saint Nicholas Cathedral, being the same premises mentioned in the amended complaint. Said premises pursuant to the above rules of the Russian Orthodox Church are held in trust for the benefit of the accredited Archbishop of the said Archdiocese, to be possessed, occupied and used by said Archbishop as his residence, as a place for holding religious services, and other purposes related to his office and as the seat and headquarters for the administration, by him, of the affairs of the Archdiocese both temporal and spiritual.

Sixth.—This defendant, by virtue of his appointment as Archbishop of the Archdiocese of North America and the Aleutian Islands is entitled to the possession, occupancy and use of the premises mentioned in the amended complaint.

For a Second Affirmative Defense this Defendant, Alleges:

Seventh.—Since its corporation in 1925, plaintiff has been wholly inactive and it has lost its status as a corporation by non-user and the persons, if any, who proported to authorize plaintiff to bring this action had no authority to do so and plaintiff has no authority or standing to bring this action.

For a Third Affirmative Defense this Defendant, Alleges:

Eighth.—The cause of action alleged in the amended complaint did not accrue within the time permitted by law [fols. 10-12] for the commencement of this action and the action is barred by the Statute of Limitations.

For a Fourth Affirmative Defense this Defendant, Alleges:

Ninth.—Recovery by plaintiff in this action is barred by plaintiff's laches.

Wherefore, this defendant demands judgment dismissing the amended complaint with costs.

Philip Adler, Attorney for Defendant Benjamin Fedchenkoff, Office & P. O. Address, 8 West 40th Street, Borough of Manhattan, City of New York.

(Verified by P. Adler, October , 1947.)

(Judgment in favor of defendants dismissing amended complaint with costs in the Supreme Court, State of New York—omitted in printing.)

[fol. 13] Supreme Court of New York, New York County, Trial Term—Part X

New York, October 9, 1947.

Before: Hon. Bernard Botein, Justice.

Appearances: Ralph Montgomery Arkush, Esq., Attorney for the Plaintiff, Robert H. Kilroe, Esq., of Counsel.

Philip Adler, Esq., Attorney for the Defendants.

Transcript of Evidence

(Stipulation waiving Civil Practice Act, Sections 439 and 440—omitted in printing.)

Mr. Adler: Your Honor, I have served notice on the other side for leave to file an amended answer and I under-[fols. 14-16] stand that there is no objection.

Mr. Kilroe: There is no objection, your Honor.

The Court: Is Kedroff represented here?

Mr. Adler: Yes, I appear for him, too.

The Court: Make that clear on the record, that Mr. Adler appears for both defendants, because in the answer you appear solely for the Church.

Mr. Adler: This answer is not appropriate to the defendent Kedroff.

Mr. Kilroe: I offer in evidence an act to incorporate Saint Nicholas Cathedral of the Russian Orthodox Church in North America in 1925.

Mr. Adler: * * * I reserve the right to argue the constitutionality of any part thereof if it becomes material.

The Court: Surely.

(Received in evidence and marked Plaintiff's Exhibit 1.)

(Pursuant to stipulation "colloquy of counsel in which Mr. Arkush, appellee's attorney, states that he was informed that Mr. Valerian E. Graves was the person actively attending to the detailed legal affairs of the plaintiff corporation and he has been dead for a number of years", is omitted in printing.)

[fol. 17] Archbishop Leonty Turkevich, residing at 1121 North Leavitt Street, Chicago, Illinois, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

[fol. 18] Direct examination.

By Mr. Kilroe:

Q. Are you a duly ordained priest of the Russian Orthodox Church?

A. Yes, sir.

Q. Russian Orthodox Greek Church, rather.

A. Yes, sir.

Q. When were you ordained?

A. 1905.

Q. What year did you come to this country from Russia?

A. It is the southern part of Russia.

Q. What is that?

A. I came here from the southern part of Russia.

Q. No, no. I said, what year did you come from Russia?

A. What year? 1906.

Q. And you have been a clergyman from that time, from the time you were ordained, up to date?

A. Up to date.

[fol. 19] Q. Have you made a study of the history of the Russian Orthodox Greek Catholic Church of North America?

A. Yes, I have.

Q. Did you write any books on the subject?

A. I edited two volumes of history of Russian Orthodox Church in North America.

Q. Would you give his Honor——

By Mr. Kilroe:

Q. Would you give his Honor a brief history, not a detailed history, of the Russian Orthodox Greek Catholic Church of North America?

(Colloquy)

A. The Russian Orthodox Church in America started in the end of the 17th Century.

(Colloquy)

Q. What year was that?

A. You say 17th Century? About 1793.

Mr. Kilroe: That would be——?

The Court: The end of the 18th Century.

Mr. Adler: He was a century off, was he?

Mr. Kilroe: That is right.

Q. All right, continue.

A. In Alaska and on Aleutian Islands. After that, Russian Orthodoxy was distributed in the United States [fol. 20] from San Francisco to other cities and Canada, to New York. In its history, changed the names of itself, as I remember, four times.

Q. Well, what were the names? What were the former names?

A. First, from 1793 until 1870 they called themselves the Russian American Mission of the Russian Orthodox Church. Since 1870 until 1904, they received the name Diocese of Alaska and the Aleutian Islands of the Russian Orthodox Church. Since 1904, when the Cathedral was transferred to the Atlantic Coast, the name was Diocese of North America and the Aleutian Islands of the Russian

Orthodox Church. And since 1924, we call the Church——

[fol. 21] By Mr. Kilroe:

Q. Were you acquainted with the history of Saint Nicholas Cathedral, that is, the Cathedral that is the subject of this litigation?

A. Yes, sir.

Q. Well, would you tell his Honor briefly the history of the church and the Cathedral?

A. The parish of Russian Orthodox Church in New York starts in 1893 as brotherhood and a small group, asking to build a church and have regular services. And after a while they collect money and start the building on the same place as Saint Nicholas Cathedral is now, about 1905. They started in 1903, and the church was consecrated in 1905, and was a parish church at that time. After transferring the Cathedral Episcopal from San Francisco to New York, Saint Nicholas Church started as a Cathedral of Russia.

Q. That was in 1925?

A. Yes.

Mr. Adler: 1905.

The Witness: 1905.

Q. Well, take us up to 1925 in the history and stop there.

A. I was Dean of this Cathedral since 1914 until 1926 when I——

[fols. 22-25] Q. No, we will take that up later. In 1925, you were the Dean of the Cathedral, you say?

A. Yes, I was.

Q. Were you present at the first meeting of the trustees of Saint Nicholas Cathedral of the Russian Orthodox Church in North America, which was held on April 23, 1925?

A. Yes.

Q. I show you a copy of the minutes of that meeting and ask you, first of all, does that refresh your recollection of the meeting, and, second, if that is a true copy of the minutes?

A. I know that minutes.

[fol. 26] By Mr. Kilroe:

Q. How long did you continue as Dean of the plaintiff corporation up at the Cathedral?

Mr. Adler: Not the plaintiff corporation; of the Cathedral.

[fols. 27-34] Q. Yes, of the Cathedral, of No. 13-15 East 97th Street.

A. (Through interpreter) Since 1914 until 1926.

Q. What time in 1926 did you leave the Cathedral? What month? Do you remember?

A. March or April.

* * * * * * *

(Thereupon a recess was taken until 2:00 o'clock P. M.)

AFTERNOON SESSION

2:00 P. M.

Archbishop LEONTY TURKEVICH, resumed the stand and testified further as follows:

Direct examination.

By Mr. Kilroe (Continued).

[fol. 35] Q. What was the occasion of you leaving the Cathedral in April 1926?

A. The court issued a decree in favor of the Metropoli-
[fol. 36] tan who had been sent from Moscow as a representative of the Living Church.

Mr. Kilroe: I offer in evidence a copy of the judgment in the case of Kedrovsky v. Platon Rojdesvensky and Turkevich.

(Received in evidence and deemed marked Plaintiff's Exhibit 4.)

The Court: It is cited in your briefs?

The Court: I can take judicial notice of it anyway.

By Mr. Kilroe:

Q. Do you know of your own knowledge how long John Kedrovsky occupied the Cathedral?

Mr. Adler: I will concede that. Until 1934, when he died.

Mr. Kilroe: Yes. That is all.

[fol. 37] Cross examination.

By Mr. Adler:

Q. After the Russian Church was organized in Russia, there was first a Supreme Church Authority under the Patriarch of Russia, was there not, at the beginning, after the church was organized?

Mr. Kilroe: I suggest that you speak through the interpreter.

Q. I will repeat the question. Prior to the time of Peter the Great, was the Supreme Church Authority of the Russian Church a Patriarch and his Synod? Is that right?

A. Yes.

Q. Peter the Great abolished the Patriarch, did he not?

A. Yes.

Q. And there was established a body known as the Holy Synod, which was the supreme church authority of the Russian Church, is that right?

A. Correct.

Q. Now, the supreme authority of the Russian Orthodox Church from the time of Peter the Great to 1917 was this Holy Synod?

A. It is correct.

Q. In 1917 was there held in Russia a convention known as a Sobor?

A. Yes.

Q. By the way, you were a delegate to that Sobor, were you not?

A. I was.

Q. A Sobor is a convention, is it not, of representatives of bishops, clergymen and laymen from all branches of the Russian Church throughout the world, is that so?

A. That is correct.

Q. And that Sobor of 1917 was such a convention, was it not?

A. Yes.

Q. That Sobor passed various resolutions and enactments, did it not?

A. Yes.

Q. And these resolutions and enactments passed by that Sobor of 1917 to 1918 are binding upon the entire body of

[fol. 38] the Russian Church throughout the world, are they not?

A. Yes.

Q. One of the things that Sobor did was to restore the authority of the Patriarch and his Holy Synod, was it not?

A. Yes.

Q. The Sobors are the supreme church authority of the Russian Church of the entire world?

A. Yes.

Q. But in the intervals, between meetings of Sobors, it is the Patriarch and his Holy Synod that is the supreme church authority, isn't that so?

A. That is so.

The Court: Do you understand everything that is being asked?

The Witness: Yes, I understand.

Q. The Russian Church is a Missionary Church? Do you know what I mean? It establishes branches and missions outside of Russia?

A. No, it is Diocese.

Q. I understand, but in order to establish a diocese, you first have to establish a mission, don't you?

A. Yes.

Q. Now, the Russian Church established missions in Japan and in China, did it not?

A. Yes, but——

Q. Yes, and then it established a mission in the North American Continent, did it not?

A. Yes.

Q. Around 1800 or so?

A. Yes.

Q. The first mission was established in Alaska?

A. Alaska.

Q. And the headquarters of that mission were in Sitka, a city in Alaska, were they not?

A. Yes.

Q. And then other missions of the Russian Church were established in Canada and the United States, is that not so?

A. Yes.

[fol. 39] Q. Then in around 1895 the headquarters of the Russian Foreign Mission in North America were transferred to San Francisco?

A. Yes, in 1870.

Q. No, 1895 to San Francisco.

A. 1870.

Q. Oh, 1870 to San Francisco. Then isn't it a fact that up to that time the affairs of the Russian Church in the North American Continent, in the Aleutian Islands, in Canada, and in the United States, were governed by the church authorities in Russia?

A. Yes.

Q. And thereafter wasn't an Archbishop to govern the Mission, the Foreign Mission in the North American Archdiocese, appointed by the Russian Church authorities in Russia?

A. Yes.

Q. When was the first Archbishop appointed, approximately?

A. 1904.

Q. 1904. And who was that Bishop? Do you know his name?

A. Bishop Tikhon.

Q. Bishop Tikhon was appointed by the Holy Synod of Russia?

A. Yes.

Q. That was the supreme church authority?

A. Yes.

Q. And he was appointed Archbishop of the North American Archdiocese?

A. Yes.

Q. Which at that time was known as the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Church?

A. Yes.

Q. Bishop Tikhon was not elected by any clergymen, bishops or laymen in the United States, was he?

A. No.

Q. He was appointed from Russia?

A. Yes.

Q. And that was in accordance with the customs and rules governing the Russian Church, was it not?

A. Until 1917.

Q. That is right, until 1917. The land for the Saint Nicholas Cathedral was acquired and the Cathedral built [fol. 40] in around 1903 or so in New York City?

A. Yes.

Q. That is right. And the seat, the headquarters of the American Archdiocese was moved from San Francisco to Saint Nicholas Cathedral, New York, in about 1905, isn't that so?

A. Yes.

Q. And the Archbishop appointed by the supreme church authorities in Russia, the Archbishop of the American Archdiocese, moved into Saint Nicholas Cathedral?

A. Yes.

Q. And he lived there?

A. Yes.

Q. That Archbishop, so appointed, used Saint Nicholas Cathedral as the headquarters of his Archdiocese, did he not?

A. Yes, sir.

Q. And this Archbishop, so appointed, also used Saint Nicholas Cathedral as a place of worship?

A. Yes, sir.

Q. And that was in accordance with the rules governing the Russian Church?

A. Until 1917.

Q. I am talking about up to 1917. All right. Now, in 1905 you were still in Russia, were you not?

A. In Russia.

Q. Don't you know that while you were in Russia the Russian Church in Russia and the Russian Government sent large sums of money to the United States to build Saint Nicholas Cathedral in New York?

A. Yes, for helping resources which they find here.

Q. Now, wait a minute. You weren't here in 1905, were you? You weren't in the United States in 1905?

A. No.

Q. So of your own knowledge you don't know what resources existed in the United States in 1905?

A. I know——

Q. Isn't that a fact? You were in Russia at the time, weren't you?

A. (Through interpreter) I was in Russia, but Father [fol. 41] Hotovitsky wrote me in Russia. I knew him since my childhood and he wrote me letters and sent me magazines.

Q. And you say that Father Hotovitsky told you that some money was raised in New York for the Cathedral?

A. Yes.

Q. But you do know of your own knowledge that large sums of money were sent by the Russian Church and Russian Government from Russia to acquire the land and build the Cathedral?

A. Yes.

Q. Do you know the sums of money that were sent from Russia?

A. (Through interpreter) About $60,000 in American currency, about $120,000 in Russian currency.

Q. That is all you know about it?

A. Yes.

Q. Didn't you hear that larger sums of about $150,000 to $175,000 had been sent from Russia for the Cathedral?

A. (Through interpreter) Additional sums were sent, but I never hear those amounts.

Q. You came to the United States around 1906?

A. (Nodding yes.)

Q. Yes?

A. Yes.

Q. When you came here you found Archbishop Tikhon at the Cathedral?

A. Yes, sir.

Q. And you were then appointed Dean of the Cathedral, were you not?

A. Yes, sir.

Q. Are not the functions of a Dean to take care physically of the custody of the building?

A. Yes.

Q. That is all?

A. (Through interpreter) Yes.

Q. The Dean is appointed by the Archbishop, is he not?

A. (Through interpreter) He is appointed by the Synod upon representation by the Archbishop.

Q. The Synod in New York, not the Synod in Russia, isn't that so?

A. In New York.

[fol. 42] Q. All right. Now, let us clarify that. The Bishop rules the Archdiocese with the help of a Council which is known either as a Synod or a Consistory, isn't that so?

A. Yes.

Q. This Synod or Consistory or Council is appointed by the Archbishop?

A. Yes.

Q. But that is a local Council of the local Bishops in the Archdiocese?

A. Yes.

Q. The supreme church authority in Russia, whether it is the Patriarch or Holy Synod, has nothing to do with this local Synod?

Mr. Kilroe: If your Honor pleases, on this line of questioning, I believe the time that the question applies to should be stated because there have been certain changes.

Mr. Adler: Up to 1917.

Mr. Kilroe: Oh, I didn't know that.

The Court: He has constantly made that reservation. That is what I understood. We are only talking of up to 1917.

Mr. Adler: We can't know what happened later unless we know what happened before. Up to 1917, I am talking about.

By Mr. Adler:

Q. The Archbishop can remove the Dean at his pleasure, can't he?

A. (Through interpreter) Only upon representations to the Synod.

Q. Of his local Synod?

A. No, no, the Holy Synod in Russia.

Q. I am talking of the Dean.

A. Certainly. I was appointed from Holy Synod.

Q. In Russia?

A. In Russia.

Q. To be the Dean of the Cathedral?

A. Certainly.

[fol. 43] Q. The Archbishop of the American Archdiocese, you said, is appointed by the supreme church authority in Russia, is that right? (Through interpreter)

A. Yes.

Q. And the Supreme Church Authority in Russia can remove the American Archbishop? (Through interpreter)

A. Of course.

Q. (Through interpreter) And they can appoint somebody in his stead?

A. Yes, and they can appoint somebody else in his place, if there are reasons for relieving him of his office.

Q. Well, the Supreme Church Authority, whether it is the Patriarch or the Holy Synod, doesn't have to give any reasons to anybody? They can remove any Archbishop any time they want, isn't that so?

A. Until 1917.

Q. I am talking of 1917, up to 1917. They could remove him any time?

A. (Nodding yes.)

Q. And the Archbishop of the American Archdiocese is responsible and answerable to the Supreme Church Authority in Russia?

A. Yes.

Q. When you came to the United States, I believe you said you found Archbishop Tikhon?

A. Yes.

Q. How long did Tikhon remain Archbishop?

A. Until 1907.

Q. Until 1907. Did he leave the United States and go back to Russia?

A. Yes.

Q. After 1907 who became Archbishop?

A. Archbishop Platon.

Q. Was he appointed by the supreme church authority?

A. Yes, sir.

Q. In Russia?

A. Russia.

Q. How long did he remain Archbishop?

A. Until 1913.

[fol. 44] Q. And did he go back to Russia then?

A. Yes.

Q. Who became the Archbishop thereafter?

A. Evdokim Meschersky. Platon was until 1914.

Q. And Evdokim was appointed after 1914?

A. Yes.

Q. I think the last statement we have is that after 1914 Archbishop Evdokim Meschersky was appointed Archbishop of the American Archdiocese by the supreme church authorities in Russia?

A. Yes, sir.

Q. And Archbishop Evdokim remained such Archbishop in United States until 1917, did he not?

A. Yes, sir.

Q. When he returned to Russia?

A. Yes, sir.

Q. And he didn't come back?

A. No, sir.

Q. From the period that you are in the United States, from 1905 until 1917, all three Archbishops used and occupied Saint Nicholas Cathedral as a residence, as their headquarters as Archbishops and as a place of worship, isn't that so?

A. Yes, sir.

Q. And under the rules of the Russian Church is not one of the attributes of the office of the duly appointed Archbishop of the Archdiocese to possess, occupy, and use Saint Nicholas Cathedral? Do you understand me?

A. I understand.

Q. And the answer is?

A. Certainly.

Q. Certainly. That is right, possession, use and occupancy of Saint Nicholas Cathedral by anybody other than the accredited Archbishop appointed by the supreme church authorities in Russia would violate the rules and the constitution of the Russian Orthodox Church, would it not?

A. Yes.

Q. When an Archbishop appointed by the supreme church authorities in Russia, an Achbishop of the American [fol. 45] Archdiocese, resigns, dies or is removed, such Archbishop cannot appoint his successor, but his successor must be appointed by the supreme church authority in Russia, isn't that so? (Through interpreter)

A. Yes.

Mr. Adler: At this point, your Honor, I want to offer in evidence a portion of the enactments of the Sobor of 1917 and 1918 which in my opinion bear upon the specific issue in the case.

[fol. 46] May I read into the record the following portions of the exhibit which appears at 596 of the Kedrovsky record? I won't be too long, your Honor.

"Enactments

"concerning the general rules of the Supreme Administration of the Orthodox Russian Church, Nov. 4, 1917."

Mr. Arkush: Excuse me a minute. Would you have any objection to the witness following in Russian as you read?

Mr. Adler: None at all. But I wonder if he can do that. If he can follow it, very well.

"1st. The supreme authority, legislative, administrative, judicial and supervisory—within the Orthodox Russian Church is in the Sobor, which shall be convoked periodically, at established intervals and composed of bishops, clergymen and laymen.

"2nd. The Patriarchate is re-established and the Patriarch shall be the head of the Church Administration * * *

"Enactments

"concerning the rights and duties of Most Holy Patriarch of Moscow and all Russia."

[fol. 47] "2nd. The Patriarch shall

"(a) have charge of the internal and external welfare of the Russian Church * * *

"3rd. The Patriarch's name (instead of mentioning the Synod) shall be proclaimed at the Divine Services in all churches of the Russian Orthodox Church * * *

"Enactments

"concerning the Sacred Synod and Supreme Church Council.

"1st. The Administration of the Church affairs is in the all Russian Patriarch together with the Sacred Synod and Supreme Church Council.

"2nd. The Patriarch, Sacred Synod and Supreme Church Council are responsible to the All Russian Local Sobor, and shall submit to it their reports of their activities during the period between two Sobors * * *

"5th. For the purpose of calling the Diocesan Bishops to the Sacred Synod all dioceses of the Russian Orthodox Church are divided into the five following groups."

Then are (a), (b), (c), (d), (e) (Siberian).

"(N.B. To the Siberian group belong the North American Diocese and Japanese, Chinese and Ourmian Missions."

Then:

"Enactments

"concerning the categories of affairs within the jurisdiction of the organs of the Supreme Church Administration, December 8th, 1918,

"IV. Church administration and Church discipline.

[fol. 48] "1. Considering reports of the condition of dioceses.

"2. Confirmation of bishops elected to the diocese in their office, their appointment in proper cases and their retirements. * * *"

"Enactments

"of the Holy Sobor of the Russian Orthodox Church concerning Diocesan Administration, 14, 20, 22, February, 1918,

"Chapter 1. Diocese, its organizations and institutions.

"1. The diocese is a part of the Orthodox Church canonically ruled by a diocesan bishop.

"2. The boundaries of a diocese are established by the Supreme Church authority. * * *"

"Chapter 2. Diocesan Bishops.

"15. The diocesan bishop by the succession of authority from Holy Apostles is the head representatives of the local Church ruling the diocese with the joint cooperation of clergy and laymen.

"16. The diocesan bishop shall be elected as follows:

"After a diocesan chair has become vacant and before that vacancy is filled, the bishops of the district (as it was proposed to divide the whole Church in a few semiautonomous districts) or if there are no districts, the Sacred Synod of the Russian Church shall prepare a list of candidates, in which shall also be included the candidates who have been nominated by the diocese. After the list of candidates has been published in the diocese, all the bishops [fol. 49] of the district or all bishops who have been appointed by the Sacred Synod to take part in the election of the diocesan bishop, clergy and laymen of the diocese

jointly elect a candidate in accordance with special rules, whereat all persons mentioned in the list shall be voted together and the candidate who receives no less than 2/3 of votes shall be considered elected and his election shall be submitted to the confirmation of the Supreme Church Authority. If no candidate has received such majority, every candidate who received some votes at the first voting shall be voted separately and those who receive no less than half of all votes shall be submitted to the Supreme Church Authority.

"Notice: 1st. In extraordinary and exceptional cases if the welfare of the Church so requires, bishops may be appointed and transferred by the Supreme Church Authority.

"Notice 2nd. In a diocese where a large missionary activity shall be developed and where many non-Russians are living, the diocesan bishop shall be elected among the candidates who have experience in missionary work; otherwise bishops to such dioceses may be appointed by the Supreme Church Authority.

"Notice 3rd. Bishops to the foreign missions shall be appointed by the Sacred Synod."

The Court: That is as distinguished from districts?

Mr. Adler: As distinguished from districts within Russia, [fol. 50] the local dioceses where they allow elections, but as far as foreign archidioceses, the archbishops are appointed by the Supreme Church Authority, which has been the practice, as the witness has testified.

Mr. Arkush: Our contention is that since 1917 the North American Diocese was a diocese, not a mission. That has already been read by Mr. Adler from the Statutes of the Sobor.

Mr. Adler: All right, we will find out what happened after 1917. First let us find out what was the fact before that date.

Then I will read 23.

"23. Without the consent of the diocesan bishop no decision of any institution of the diocesan administration may be put into effect."

Mr. Arkush: Read 31, will you, please?

Mr. Adler: (Reading)

"31. The diocesan convention is a superior body with

the assistance of which the diocesan bishop rules the diocese."

By Mr. Adler:

Q. Now, these enactments that I have read were enactments of that Sobor of 1917?

A. Yes, sir.

Q. And which are binding, as you say, upon the entire body of the Church?

A. Yes, sir.

Q. Now a foreign mission or a diocese, foreign diocese, or a diocese abroad, or an archdiocese, is a branch and subdivision of the entire body of the Russian Orthodox Church, is it not?

A. Yes, sir.

Q. A mission or a diocese, or an archdiocese, either abroad, outside the confines of Russia, or within the terri- [fol. 51] tory of Russia, is not an independent Church, an independent member of the family of Orthodox Churches? That is not so, is it? Do you understand me?

Q. A foreign mission or diocese or archdiocese is ruled by an archbishop appointed by the Supreme Church Authorities in Russia, isn't that so?

A. After 1917?

Q. No, up to 1917.

A. Up to 1917?

Q. Yes.

A. Yes, but not after.

Q. Up to 1917?

A. Yes.

Q. These enactments that I have just read didn't change Russian usage and custom of the Russian Church, did they? They confirmed what had existed for years before, isn't that true?

A. No change.

Q. They did make changes?

A. Yes.

Q. All right. But you said before that the enactments of the Sobor of 1917 are binding upon the entire body of the Russian Church?

A. Yes.

Q. Now in 1917 while Archbishop Evdokim was still in the United States and while you were still Dean, didn't you

participate in or weren't you one of the incorporators of a corporation known as The Corporation of the Archbishop and Consistory of the Russian Orthodox Greek Catholic Church?

[fol. 52] Mr. Arkush: Excuse me. Will counsel state whether that was the Pennsylvania or New York corporation?

Mr. Adler: No, New York.

Q. You did?

A. Yes.

Q. Now, I show you what purports to be the by-laws of this corporation and point to Article 3 thereof, page 7.

A. I have it.

Q. I want you to look at Section 1. You have seen it. Section 1 reads as follows——

A. Yes.

Q. Well, you read it before I put it in the record. Have you read it now?

A. Yes? Article 13?

Q. Article 3, under the heading "Organization," Section 1.

Q. You subscribed to that statement, didn't you?

A. Yes.

Q. And that statement is correct, is it not?

A. Yes, sir.

Q. May I then read it?

"The Russian Orthodox Greek Catholic Church in North America will be ruled by the Archbishop (or his substitute) appointed by the Russian Holy Synod in Russia."

A. (Nodding yes.)

Q. Sometime in 1924 an action was brought in the Supreme Court in this county by Kedrovsky against Platon Rojdesvensky. Do you recall that?

A. Yes.

Q. You were a witness at that trial?

A. And against me too.

Q. Oh, yes, that is right. You were one of the defendants, that is right. And you were a witness in that trial, were you not?

A. Yes, sir.

[fol. 53] Q. You testified on behalf of Archbishop Platon?

A. Yes, sir.

Q. Archbishop Platon at that time was occupying Saint Nicholas Cathedral, was he not?

A. Yes, sir.

Q. And Archbishop Platon claimed that he was the duly appointed Archbishop of the Archdiocese by the appointment of the Supreme Church Authority in Russia, isn't that so?

A. Not exactly.

Q. Not exactly? Very well. Didn't you send a telegram to the Patriarch in Russia sometime in 1922 or 1923, asking that Archbishop Platon be appointed Archbishop of the North American Archdiocese?

A. I did send it.

Q. And didn't you testify at the trial that Archbishop Platon did receive such appointment as Archbishop of the American Archdiocese by the Patriarch of Russia?

A. Yes, sir.

Q. You didn't claim at the trial, which took place in 1924, that Archbishop Platon was Archbishop by virtue of any action of any bishops in the diocese of North America, but by virtue of some appointment by the Patriarch in Russia, isn't that so?

A. Yes, sir.

Q. Kedrovsky claimed that he was appointed Archbishop by the Supreme Church Authority in Russia, did he not?

A. Yes, sir.

Q. (Through interpreter) The lower court decided that Platon had been appointed, was the Archbishop?

A. Yes.

Q. But that decision was reversed by the upper courts, isn't that so?

A. Yes, sir.

Q. And the upper courts ruled that Platon was not appointed Archbishop of the American Archdiocese, isn't that so? He was not appointed by the Patriarch?

[fol. 54] By Mr. Adler:

Q. And both you and Archbishop Platon were enjoined [fol. 55] from interfering with Kedrovsky's occupation, possession and use of Saint Nicholas Cathedral?

A. Yes.

Q. So you and Archbishop Platon surrendered the Cathedral to Kedrovsky sometime in 1925 or 1926?

A. 1926.

Q. And since that time neither you nor Archbishop Platon nor anyone claiming to succeed him has ever occupied Saint Nicholas Cathedral up to this day?

A. Yes, sir.

(Colloquy)

Q. In 1924, in Detroit, a convention of a number of Russian churches in United States was held, was it not?

A. Yes, sir.

Q. That convention was held under the leadership or presidency of Archbishop Platon Rojdesvensky, was it not?

A. (Through interpreter) The meeting was started by Bishop Stephan, and then the Metropolitan Platon was invited.

Q. Very well. Now, this convention in Detroit passed various resolutions, did it not?

A. Yes, sir.

Mr. Adler: Now I offer in evidence so much of a resolution passed at that Detroit convention, reading as follows:

"1. Declare the Russian Orthodox Diocese in America a self-ruling Church, so that it shall be ruled by its elected Archbishop through a convention of Bishops and Council formed of elected members consisting of clergy and laity, and through periodical conventions of the American Church.

3. Beg the most Reverend Metropolitan Platon to head [fol. 56] the Church Administration and rule it, at first with the aid of the existing Episcopal and Diocesan Council, and workout in speedy order * * * plans of a permanent administration of the American Church for the future, according to the fundamentals of Orthodoxy, and must be organized on elective conventional basis.

"2. * * * Acknowledge that the orders of the Patriarch cannot be fulfilled even though they did take place because they are beyond his power. His orders can be enforced only by a trial. He was forced to do so.

"3. Beg Metropolitan Platon not to leave the Diocese henceforth but be it unanimously elected (I suppose it means be he) Archshepherd and Ruling Bishop as long as the Lord shall give him the power to serve the American Church."

By Mr. Adler:

Q. This was a portion of the resolutions passed at that Detroit convention, was it not?

A. Yes, that is part of the resolution.

Q. (Through interpreter) The Metropolitan Platon referred to in this resolution is the same man who was the defendant and who was defeated in the Kedrovsky case, was he not?

A. (Through interpreter) Yes, the same one.

Q. Was there another convention of the Church which describes itself in that resolution as the American Church held in 1935?

Mr. Arkush: 1934.

Q. (Through interpreter) In Cleveland?

A. Yes.

[fol. 57] Q. At that time had Metropolitan Platon died?

A. Yes.

Q. Who was elected as Archbishop of this American Church in place of Archbishop Platon?

A. Archbishop Theophilus.

Q. Archbishop Theophilus was also a witness for Archbishop Platon in the Kedrovsky case, was he not?

A. Yes.

Q. Yes, he was. And do you recall that Archbishop Theophilus, then called Reverend Pashkovsky, testified that Archbishop Platon had been appointed Archbishop of the American Diocese by the Patriarch?

A. Yes, sir.

Q. And do you recall that Reverend Pashkovsky then testified in the Kedrovsky trial that only the Supreme Church Authority in Russia could appoint an Archbishop of the American Diocese?

A. Yes, sir.

Q. Didn't he so testify?

A. Yes.

Q. All right. Now, do you know who consecrated Reverend Pashkovsky a Bishop?

A. Metropolitan Theophilus.

Q. No, no.

A. Metropolitan Platon.

Q. Metropolitan Platon. And who else? Well, one Bishop can't consecrate another Bishop. You may not

remember, but there were two other Bishops, were there not?

A. Yes.

Q. Can you supply me the names?

A. Archbishop Platon and Archbishop Eftimios of Brooklyn and Archbishop Panteleimon of Jerusalem.

Q. Do you know whether this consecration of Reverend Pashkovsky as Bishop Theophilus was confirmed by the Supreme Church in Russia, yes or no?

A. No.

Q. It was not?

A. No.

[fol. 58] Q. The Sobor of 1917, the enactments of the Sobor of 1917, required, did they not, that consecration of Bishops must be confirmed by the Supreme Church Authority in Russia?

A. Yes.

Q. But in the case of Reverend Pashkovsky there was no such confirmation of his consecration, was there? The answer is no, isn't it?

A. Confirmation was not.

Q. All right. There was no confirmation by the Supreme Church in Russia of the consecration of Bishop Theophilus?

A. (Nodding yes.)

Q. Canon law requires, does it not, that a priest to be consecrated a bishop must be consecrated by two other bishops?

A. Two or three.

Q. Two or fifty, it doesn't matter, but at least two.

A. At least two.

Q. And before one bishop can consecrate a priest as a bishop, the consecrating bishop must receive authority from the Supreme Church Authority, does he not?

A. Yes, but you——

Q. The answer is yes?

A. Oh, yes.

Q. Isn't it part of the church law that a bishop of one branch of the Orthodox Church, like the Church of the Patriarch of Jerusalem, has no authority to consecrate a bishop of another member of another Church, like the Russian Orthodox Church?

A. We recognize a presiding bishop as having leading part of consecration.

Mr. Adler: What is that answer?

(The answer was repeated in Russian through the interpreter as follows: "We regard as the main bishop the one who performs the act of consecration. The other bishops are invited.")

[fol. 59] Q. Do you mean to say that under canon law one bishop may consecrate a priest a bishop?

A. No.

Q. It requires at least two bishops, does it not?

A. Certainly.

Q. Both bishops must participate in the ceremony of consecration?

A. Yes.

Q. To participate in a ceremony of consecration a bishop must receive the authority of the Supreme Church Authority of his Church, isn't that so?

A. No.

Q. Do you mean to say that you, under canon law, have the right to consecrate a priest a bishop without authority from your Supreme Church Authority?

A. Oh, yes.

Q. Without consulting them or advising them?

A. I should ask permission.

Q. You should ask permission?

A. Yes.

Q. And if they don't give permission you have no such authority, isn't that so?

A. No.

Q. You do not have authority?

A. No.

Q. In other words, the permission of the Supreme Church Authority is necessary to authorize a bishop to consecrate a priest a bishop?

A. Yes.

Q. All right. Under canon law, may a bishop, say, under the authority of the Patriarch of Jerusalem consecrate or participate in a consecration ceremony of a person as a bishop of the Russian Orthodox Church?

A. Sometimes, yes.

Q. Well, he participates in it, but as a visitor.

A. As a visitor.

Q. But he cannot be one of the two necessary consecrating bishops, isn't that so?.

A. Yes.

Q. When you say "yes," I don't know what you mean. [fol. 60] You say he can or cannot? For example—let me withdraw my question and put it this way.

A. I may answer you.

Q. All right.

A. (Through interpreter) We have examples in Russia that there is a Patriarch from foreign parts participated in the consecration of a bishop, was acting bishop in the consecrating of a bishop in Russia.

Q. All right. Now, let me put it this way: May a Russian bishop, one Russian bishop, and one bishop under the jurisdiction of the Patriarch of Jerusalem or the Patriarch of Constantinople or any of the other Patriarchs, consecrate a Russian priest a Russian bishop?

A. Yes.

Q. All right. Now in the 1934 convention in Cleveland, was it?.

Mr. Arkush: Yes.

Q. (Continuing) Metropolitan Theophilus, who is the man who was consecrated as you said a moment ago without confirmation by the Supreme Church Authority in Russia was elected Archbishop to succeed Archbishop Platon, was he not?

A. Yes, sir.

A. And Archbishop or Metropolitan Theophilus has remained in that office to this day?

A. Yes, sir.

Q. By the way, to clear up a misunderstanding there is no difference between a metropolitan and an archbishop, is there, in rank or standing or power?

A. (Through interpreter) A metropolitan has the right to rule over a few archbishops.

Q. (Through interpreter) Well, isn't the fact as follows: That all metropolitans are archbishops?

A. No.

Q. That isn't so?

A. In the Russian Church, no.

[fol. 61] Q. (Through interpreter) Isn't the metropolitan an archbishop who lives in a large city, coming from the word "metropolis", the Greek word? Isn't that so?

A. (Through interpreter) No. He has a right over a whole district.

Q. (Through interpreter) That is right. And if an archbishop has the right over a whole district and his seat of government is in a large city, isn't such an archbishop called a metropolitan?

A. (Through interpreter) If he rules, then he is a metropolitan.

Q. Of course, if he rules he is a metropolitan. Now I believe you stated that the plaintiff corporation, Saint Nicholas Cathedral of the Russian Orthodox Church in North America, that you took care of paying taxes for that corporation?

A. Yes.

Q. You did?

A. Yes.

Q. What kind of taxes did you pay?

A. For water.

Q. Well——

A. For cleaning the streets.

Q. Well, you paid for water or cleaning the streets for the Cathedral, didn't you?

A. Yes.

Q. Did this plaintiff corporation have a bank account?

A. I don't know.

Q. By the way, wasn't that Cathedral exempt from taxes as a church property?

A. Church is an exemption but not a parish house.

Q. The residence?

A. Yes.

Q. Where the Archbishop resided?

A. Yes.

Q. Just that part?

A. (nodding yes.)

Q. Well, did you pay these taxes by cash or check?

A. Checks.

Q. Whose checks?

A. The checks of Saint Nicholas Cathedral.

[fol. 62] Q. But not this corporation?

A. By the order of the corporation, in the name of the corporation.

Q. At no time were you a trustee or other official of this plaintiff corporation? You were never a trustee or official?

A. Ex officio, they count me as a member of the corporation, ex officio.

Q. Is there any document, or are there any minutes showing that you were ex officio connected with that corporation?

Mr. Arkush: It is in evidence in the minutes?

A. It is in the minutes.

Mr. Arkush: "Trustees shall be the Bishop, the Dean."

Q. As Dean of the Cathedral it was your duty to make repairs for the Cathedral?

A. Yes, sir.

Q. To buy supplies for the Cathedral?

A. Yes, sir.

Q. And to pay the taxes for the Cathedral?

A. Yes, sir.

Q. All right. In 1937, another convention of this American Church was held in——

Mr. Arkush: New York.

Mr. Adler: I don't mean 1937. I mean 1946.

Q. (Continuing) —was held in Cleveland, was it not?

A. 1946?

Q. Yes.

A. Yes.

Q. And certain resolutions were passed at that convention?

A. Yes.

Mr. Adler: I offer in evidence a copy of the resolution [fol. 63] passed at that convention in Cleveland which was furnished to me by counsel for the plaintiff.

Mr. Kilroe: No objection.

(Received in evidence and marked Defendants' Exhibit A.)

By Mr. Adler:

Q. The Patriarch of Moscow and his Synod are the Supreme Authority of the Russian Orthodox Church today?

A. Yes.

Q. For several years after the Bolshevik Revolution in 1917 there were disturbances in Russia and the situation as to the Russian Church was not clear?

A. Yes, sir.

Q. But shortly thereafter the Patriarch and the Synod was re-established in Russia and would you say that for the past 20 or 25 years the canonical church in Russia is represented by the Patriarch and his Synod?

A. Now.

Q. You don't dispute that?

A. No.

Mr. Arkush: How many years?

Mr. Adler: Say 25 years.

The Witness: No.

Q. How many years? 20 years?

A. Since the time of Revolution, we don't know exactly who is the Living Church, the Patriarchal Church exists.

Q. Well——

A. Only after, since war, was elected in Moscow, Patriarch. We recognize him and name him in our Churches.

Q. In the prayers in your Churches?

A. Yes, sir.

Q. Since what time?

A. Since he was elected.

Q. Well, give us the year, 19 when?

A. 1944.

Q. 1944?

A. Yes.

[fol. 64] Q. Wasn't there to your knowledge a Patriarch of Russia before 1944?

A. Was disturbance.

Mr. Arkush: What is that?

Mr. Adler: He says there was disturbance.

The Witness: In Russia.

Q. In any event, you were in the United States and you have no personal knowledge of what occurred in Russia during that time?

A. (Through interpreter) Everybody knew it.

Q. You speak from common knowledge? Very well. (Through interpreter) in Defendants' Exhibit A, the following reference is made:

"Whereas the Patriarchal Authority is not consistent with the authority of the Synod of the Russian Orthodox Church abroad, this Sobor, hereby resolves that any administrative recognition of the Synod of the Russian Orthodox Church Abroad is hereby terminated, retaining, however, our spiritual brotherly relations with all parts of the Russian Orthodox Church."

What is meant by the term "Russian Orthodox Church Abroad"? To whom does that refer?

A. (Through interpreter) After the Russian Revolution, when conditions were unsettled, some Russian bishops outside of Russia constituted a synod.

Q. And they met at Karlovitz, did they not?

A. Yes.

Q. These Karlovitz bishops subsequently had their headquarters in Munich, Germany, did they not?

A. Now, yes.

Q. They had their headquarters in Munich, Germany, at the time of the Hitler regime, did they not?

A. No.

[fol. 65] Q. In 1934 did Metropolitan Theophilus, the head, who succeeded Metropolitan Platon, associate himself with the refugee bishops in Karlovitz?

A. Yes.

Q. And did he on behalf of this Russian Church in America, submit himself to the jurisdiction of the refugee bishops in Karlovitz?

A. (Through interpreter) Only in the nature of cooperation.

Mr. Arkush: I think we can explain it. There is no dispute about it at all.

Mr. Adler: All right.

Mr. Arkush: A temporary church administration was organized outside the borders of Russia.

Mr. Adler: Calling itself that?

Mr. Arkush: Calling itself The Russian Church Abroad, and it was intended to consist of four districts, the North American District, Western European District, the Near Eastern District, and the Far Eastern District, and bishops representing those four districts did sign certain temporary statutes which, if Mr. Adler desires, we can put in there.

The Court: Where were those statutes signed?

Mr. Arkush: At Karlovtsi, Serbia.

Mr. Adler: That is the same place I mentioned, Karlovitz.

Mr. Arkush: Under the patronage of the Orthodox Patriarch of Serbia.

Mr. Adler: That is controversial. Let us leave that out. The refugee group of bishops asserted certain powers of the Russian Church Abroad.

[fol. 66] Mr. Arkush: The point I am trying to make is that the North American Church was a part of that. It was a part of the organization. In fact, it turned out to be the leading part of the organization, because although the head of the Western European District signed, his own convention and people wouldn't ratify it, and they put themselves under the Ecumenical Patriarch of Constantinople. So, really, the only important Russian Orthodox group in this so-called Russian Church Abroad was the North American District.

The Court: Tell me this: Did this new organization purport to recognize the Patriarch in Moscow as the spiritual leader or was there proposed to be a complete severance?

Mr. Arkush: I will be glad to read it to you, if you want, or paraphrase it for you. According to their temporary statutes, it was to be temporary until religious freedom was established in Russia, when they would resume their place under the Patriarch of Russia.

Mr. Adler: Wait a minute. Will you also concede in this connection that Metropolitan Theophilus as head of this Church in America associated himself with this Karlovitz group, and that it was generally understood that this Karlovitz refugee bishops' group were supporting the

restoration of the Tzar and were allying themselves with the Hitlerian aims of that era?

Mr. Arkush: I will say what I think were the facts, because I think Mr. Adler only wants to get the exact facts.

[fol. 67] Mr. Adler: Right.

Mr. Arkush: All of our bishops more or less are refugee bishops. To call them refugee bishops doesn't mean anything. All Russians weren't in complete sympathy with the Soviet Government.

Under the constitution of this temporary organization, Metropolitan Theophilus was a part of the synod and represented the most important district. There is no question that outside of their ecclesiastical function one or more clergy or laymen connected with the central office of this synod did make some very indiscreet gestures towards—what do they call it—collaboration with Hitler.

Mr. Adler: All right.

Mr. Arkush: And that, of course, was the reason that they became so unpopular with our people.

Mr. Adler: So that in 1946, at the convention the American Church, the Russian Church in America, ruled that "Whereas, the Patriarchal authority is not consistent with the authority of the Synod of the Russian Church Abroad (that is the Karlovitz group) this Sobor does hereby resolve that any administrative recognition of the Synod of the Russian Orthodox Church Abroad is hereby (abroad meaning the Karlovitz group) terminated, retaining, however, our spiritual and brotherly relations with all parts of the Russian Orthodox Church Abroad."

[fol. 68] By Mr. Adler:

Q. Following this resolution of 1946, isn't it the fact that four bishops left the group of churches which passed this resolution in Cleveland?

A. (Through interpreter) Yes, that is a fact.

Mr. Adler: I think that is all.

Mr. Adler: May I just ask a couple of more questions on another point?

By Mr. Adler:

Q. Sometime in 1933 or 1934 did Metropolitan or Archbishop Benjamin come to this country? You know whom I mean, don't you? A. Yes, I know.

Q. And he came here, did he not, as the Archbishop appointed by the Patriarch and his Synod, the supreme church authorities of the Russian Church in Russia?

A. He said so.

Q. Well, did you accept him as such?

A. No. I don't know. He present his papers to Metropolitan Platon.

Q. Yes.

Mr. Kilroe: What was that answer? I didn't get it.

Mr. Adler: He presented his papers to Metropolitan Platon.

Q. You say he presented his papers to Metropolitan Platon. I show you this document, which I will mark for identification.

(Paper received and marked Defendants' Exhibit B for Identification.)

[fol. 69] Q. (Through interpreter) I ask you whether or not this document was presented by Metropolitan Benjamin to you or any representative of the group of churches with which you are associated, to your knowledge. If you don't know, say so.

A. (Through interpreter) I see this document for the first time.

Q. Did you learn that in 1924 and on subsequest dates the Patriarch of Moscow had suspended Metropolitan Platon?

A. I know it.

Mr. Adler: I think the last statement of the witness was that he knew that the Patriarch of Moscow had suspended Archbishop Platon for his activities in that Detroit convention, and this position that he took of independence.

The Court: Position of independence, is that what you said?

Mr. Adler: Independence or autonomy or whatever the word is. I don't think it matters much what the word is.

The Court: All right.

Q. And did you know that in 1935 the Patriarch of Moscow had issued another document suspending and condemning the action of Metropolitan Theophilus and all those associated with him who followed in the footsteps of Metropolitan Platon and had associated themselves in the resolutions of the Detroit convention?

Mr. Arkush: Did counsel say "Patriarch"?

Mr. Adler: Yes, the Patriarch of Russia.

Mr. Arkush: There was no Patriarch in 1935.

[fol. 70] Mr. Adler: Counsel makes the point that there was no Patriarch in 1935, and he may be right about it. I don't know, but I am sure he will agree there was an official Locum Tenens, which I believe means a person who holds the position in place of the Patriarch. But such Locum Tenens has all the powers and attributes of a Patriarch.

Mr. Arkush: I don't think I will concede that.

Mr. Adler: I will produce evidence along that line.

Mr. Arkush: His precise title was Acting Locum Tenens of the Patriarchal Throne.

Mr. Adler: In any event he was the chief official, the head of the Russian Orthodox Church.

The Witness: I heard that.

Mr. Adler: Now I offer in evidence the document I gave you dated January 5, 1935.

Mr. Arkush: Yes, we found that was very poorly translated and we would like to substitute a translation later.

Mr. Adler: All right, I will accept any corrections. I offer the translation.

Mr. Arkush: Subject to correction.

(Received in evidence and marked Defendants' Exhibit C.)

(Colloquy)

I offer in evidence an original document in the Russian language. I also offer into evidence the English translation of an original document in the Russian language relating to the the appointment of defendant Metropolitan Ben-

[fol. 71] jamin as Archbishop of the Archdiocese of North America and the Aleutian Islands by the Patriarch and his Synod, the Supreme Church Authority of the Russian Orthodox Church.

Mr. Kilroe: No objection.

Mr. Adler: I have given a copy of that to the other side.

(Defendants' Exhibit B for Identification was received in evidence and marked Defendants' Exhibit B.)

Mr. Kilroe: I have no objection, but I didn't finish with that, your Honor, and I would like to call your Honor's attention specifically to the first paragraph of that document.

By Mr. Adler:

Q. The Church to which you belong, of which you claim Metropolitan Theophilus is the head, by virtue of his election in the convention in Cleveland in 1934, sent representatives to a Sobor of the Russian Church which was held in Moscow in 1945, was it 1944 or 1945?

A. We tried to reach——

Q. You sent delegates there—the Sobor of the Russian Church was held in Moscow in 1944 or 1945?

A. 1944.

Mr. Arkush: No, January, 1945.

Q. January, 1945?

A. All right, January, 1945.

Q. (Through interpreter) At that Sobor were you advised that there were representatives of the various other Orthodox Churches, like the Church of the Patriarch of [fol. 72] Constantinople, the Church of the Patriarch of Jerusalem, and other Churches, or have you no information on that score?

A. They wrote and they spoke about it.

Q. Well, did the delegates who went there report that back to you?

A. They reported it.

Q. They reported that fact.

Mr. Adler: Now, I want to offer in evidence the document called the Ukase of the Patriarch of Moscow and All Russia, dated February 16, 1945, which appears on pages 11 and 12 of a journal called "The Russian Orthodox Journal," Volume 19, No. 6, issue of October, 1945.

(Colloquy)

(Received in evidence and marked Defendants' Exhibit D.)

Mr. Adler: Your Honor may want to read that now. In substance, it sets forth the position of the Patriarch on the American Church here, reaffirms the opinion on their rebellious conduct there, and lays down terms and conditions on which he would entertain their returning to the fold. That is it in substance.

I believe that is all I have at this time.

Re-direct examination.

By Mr. Kilroe:

Q. This Sobor that was held in Moscow in 1944, isn't it a fact that the American delegates or representatives to that Sobor did not reach Moscow in time to attend it? Isn't that right?

A. That is right.

[fol. 73] Mr. Adler: I will concede that. I understand that to be the fact. But I think you will admit, won't you, that they did have a talk with the Patriarch and exchanged documents and received this ukase which I have just offered?

Mr. Kilroe: I am informed that a report was simply made and that was the end of the thing.

Mr. Adler: They received the ukase, though, your delegates.

Mr. Arkush: If I may state it, subject to Mr. Adler's correction, the Russian Orthodox Church here was invited to send delegates to an All-Russian Sobor to be held in Moscow in January, 1945. The delegates selected by Metropolitan Theophilus were a bishop, two priests, and a layman. The Russian Government issued visas on their passports and offered the use of a military plane from Alaska to Moscow. Later, the Russian Government cancelled the visas on the layman's passport and put down the military plane that was carrying the bishop and one of the priests in the middle of Siberia and they had to take a train and they arrived a week late for the Sobor. They appeared before the Patriarch and the Synod, ren-

dered a full report in writing on the condition of the American Church, and a few days later received from the Patriarch the ukase which has been put in evidence.

Mr. Adler: That is my understanding of the facts.

[fol. 74] (Colloquy)

By Mr. Kilroe:

Q. (Through interpreter) Do you know how long after this Sobor of 1918 you received a copy of the various enactments that were made by the Sobor?

A. (Through interpreter) I and Father Kukulevsky each brought a copy of these enactments.

Q. Brought it back with you what date?

A. In August, 1918.

Q. (Through interpreter) What is the name of the organization of which you are an archbishop?

A. (Through interpreter) Russian Orthodox Greek Catholic Church of North America.

Mr. Kilroe: That is all.

[fol. 75] Re-cross-examination.

By Mr. Adler:

Q. When a Sobor passes certain resolutions or adopts enactments, is it not true that only a subsequent Sobor of the Church may modify or abolish these enactments?

A. It is.

Q. That is true, no other authority except a future Sobor has the power to change any of the enactments of a Sobor?

A. Yes.

Q. And since 1917 has there been any Sobor to your knowledge held of the Russian Orthodox Church which purported to change or modify any of the enactments of the Sobor of 1917?

A. In Moscow?

Q. In Moscow, in Russia.

A. (Through interpreter) That was the Sobor of the Living Church.

Q. But apart from that?

A. No.

Q. And you don't recognize the Sobor of the Living Church?

A. No.

By Mr. Kilroe:

Q. Isn't it a fact that between Sobors the High Church Authority has the right to make certain rules and regulations?

A. Yes.

By Mr. Adler:

Q. But not inconsistent with or overruling the enactment of the Sobor (through interpreter)?

A. (Through interpreter) In exceptional cases, Sobors, as it was in Russia, it was possible.

Q. Now, wait a minute. The Patriarch or the Holy Synod or anybody that has authority during the period between Sobors must follow the rules and enactments of the Sobor, must they not?

A. Yes, sir.

Q. (Through interpreter) They have no authority to change any of the rules of the Sobor?

[fol. 76] A. (Through interpreter) They have the right to issue special orders in exceptional cases.

Q. Well, show me where in that 1917 Sobor, in the enactments of that Sobor, such a right is given.

Mr. Adler: If the witness needs more time maybe he can study it over night and produce it tomorrow, if he can't find it now.

The Court: Will you ask him that, Miss Interpreter?

[fol. 77] George P. Fedotov, residing at 606 West 122nd Street, New York, N. Y., called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Arkush:

Q. What is your occupation, Professor Fedotov?

A. I am teaching Church history as visiting lecturer at the Union Theological Seminary. As a professor I am

also teaching in Russian Saint Vladimir Theological Seminary church history here.

Q. Describe briefly your educational qualifications.

A. I am graduated at Petersburg University in Russia, Petrograd University in Russia, with the Russian degree of Magistrate of General History.

Q. And that degree qualified you to teach in Russian universities?

A. Right.

Q. In what other educational institutions have you taught?

A. In Russia at the University of Petrograd and Saratov, and later, in the emigration, for 15 years I was teaching in Paris at the Russian Seminary there.

Q. That is the Russian Theological Seminary in Paris?

A. Russian Theological Seminary.

Q. In that Seminary and in the Russian Seminary here, candidates for the priesthood in the Russian Orthdox Church were being trained and are being trained?

A. Yes.

Q. And history has been your principal subject?

A. Yes.

Q. Are you also a writer on Russian Church history?

A. Yes, I am, on different subjects, particularly on history of the Russian Church.

Q. Speak a little louder.

[fol. 78] Mr. Adler: I am impressed with the qualifications of the witness and I don't think you need pursue that.

Mr. Arkush: You concede his qualifications?

Mr. Adler: Oh, yes.

Mr. Arkush: Will you also concede, Mr. Adler, that John S. Kedrovsky, who has been mentioned before in this trial, was the representative here of the so-called Renovated or New or Synodal Church in Russia?

Mr. Adler: I will concede that John S. Kedrovsky was appointed at a convention in Russia in 1923, which is described as the Sobor of 1923, as the Archbishop of the Russian American Archdiocese, and he was also appointed as the delegate and representative of that Sobor which is known, I believe, as the Church of the Holy Synod; and which I understand is sometimes referred to as the Living Church. Does that answer your purposes?

Mr. Arkush: Yes. I think, to be strictly accurate the appointment of Kedrovsky, all of which appears in the record on appeal in the case that has been mentioned, was made by the Synod and not by the Sobor.

Mr. Adler: Well, I will accept that.

By Mr. Arkush:

Q. Now, starting——

The Court: What do you have in mind by terming it the Renovated——

Mr. Arkush: Let us clear that right up, because there are [fol. 79] so many names that perhaps Professor Fedotov will explain the different names.

Mr. Adler: I think you and I can stipulate that.

Mr. Arkush: Let me see if that statement is satisfactory to you: The organization which resulted from the so-called Sobor of 1923 is called sometimes Living Church, sometimes New Church, sometimes Synodal Church, and sometimes Renovated Church.

Mr. Adler: That is correct.

Mr. Arkush: And Kedrovsky was the representative of that body here.

Mr. Adler: That is correct.

The Court: Is that the organization presently headed by the Patriarch and the Synod now?

Mr. Arkush: No, sir. That organization, I understand, has been entirely merged into the Patriarchal Church, and no longer exists.

Mr. Adler: It came back into the Patriarchal Church.

Mr. Arkush: Yes. It was a split-off which neither side in this litigation considers to have been canonical or valid.

Mr. Adler: But I believe the issue is academic because, as Mr. Arkush has stated, the Renovated or Living Church has been absorbed by the Patriarchal Church and no longer exists.

By Mr. Arkush:

Q. Are you the author of a v[illegible] entitled "The Russian Church Since the Revolution"?

A. Yes.

Q. And in the studies which you ma[illegible] preparation for [fols. 80-81] writing that volume, and [illegible] studies that

you have made, have you had occasion to see the text of an alleged ukase, alleged to have been issued by Patriarch Tikhon in 1920?

A. 1920, yes, I read it in many books.

Q. Have you that textbook here, the one I handed you?

A. I left it there.

Q. I am showing you a photostat of a document typed in the Russian language and ask you if you have within the last few minutes examined that document?

A. This document is issued by the Patriarch——

Q. No, I asked you if you examined it. Did you look at it a little while ago?

A. Not recently, but some years ago.

Q. Did you examine the copy that I just handed you a few minutes ago?

A. Yes.

Q. Have you looked at it sufficiently to remember whether that is the text with which you became familiar in your historical research?

A. Yes, it is the same text.

Q. Will you read to the Court in English simply the title and then the certifications that appear at the end? Start with the title and then the certifications.

[fol. 82] By Mr. Arkush:

Q. What was the condition, briefly, of the Russian Orthodox Church, and particularly of the central office, in or about November, 1920?

A. It was the time of the Civil War in Russia and at the same time of the acute terror by the Government.

Q. Be as objective as you can.

A. The South of Russia was cut from the North by the line of the Civil War, so the Patriarchal government was not able to communicate with the bishops outside the Bolshevik Russia, the bishops of the South Russia. That is why the Patriarch with the government issued this ukase or ediet, to give the right to the bishops outside——

[fols. 83-85] Q. Don't go into why it was issued. What we want to know is why the original document cannot be produced and why certified copies of the original document are not held here in America or anywhere else then in Karlovtsi?

A. I suppose the bishops of the South of Russia who

received this document, perhaps in one copy, they emigrated to Serbia, and then this document is certified by the Serbian Patriarch.

[fol. 86] (Received in evidence and marked Plaintiff's Exhibits 5 and 5-A, respectively.)

(Mr. Arkush stated the substance of Plaintiff's Exhibits 5 and 5-A to the Court.)

[fol. 87] The Court: What is an "eparchy"?
Mr. Arkush: Probably that is a bad translation.

By Mr. Arkush:

Q. Would that be a province?
A. Eparchy is the same as diocese.
The Court: It would include several bishoprics?
The Witness: One bishop in a diocese, in principle.

Mr. Arkush: Yesterday, your Honor, Mr. Adler offered a resolution that was adopted by the Detroit All-American Sobor of 1924. I would like to offer the rest of the minutes of that day's session, because it gives the background of the resolution.

[fols. 88-89] (Received in evidence and marked Plaintiff's Exhibit 6, consisting of 16 pages.)

By Mr. Arkush:

Q. Now, Professor Fedotov, briefly, will you start with the Bolshevik Revolution, the October Revolution, and describe the relations between the Russian Orthodox Church and the Government in Russia?
[fols. 90-91] This may be a test case for 300 cases. We only have statutes like the one in New York in one other State. That is New Jersey. We were not able to get a statute in Pennsylvania for some constitutional reason not applying to New York and New Jersey. We have most of our parishes in Pennsylvania. If we could persuade your Honor to rest your decision on two grounds, both the statute and on the legality, aside from the statute, of our autonomy, it would secure to us all our parishes anywhere in the United States or Canada.
[fol. 92] Mr. Adler: Well, I don't rest my canon rules

on political conditions. I say the canon rules remain, no matter what the political conditions are. They don't shift with changes in political government. They are permanent and are changed by the ecclesiastical body.

Mr. Arkush: That is the opposite of what we claim. When this country became independent, every Anglican church in the 13 Colonies was bound by canon law to the Church of England. It was the political fact, not the religious fact, that this was an independent country that authorized the establishment of an independent Episcopalian Church. You have to take political conditions——

Mr. Adler: This country didn't declare its independence of Russia. I don't see the analogy.

[fol. 93] Mr. Arkush: The analogy is almost exact. We are not claiming the autocephaly which the Episcopalian Church has here. We still consider ourselves as part of the Russian Church. We still acknowledge the Patriarch as our head, but we think that those close, minute, administrative regulations that were enacted by the 1917-1918 Sobor under the present political conditions in Russia and the political conditions that have existed ever since the Revolution, and particularly with tension that exists at this very moment between the two countries, are not appropriate and will not be enforced by any country.

Mr. Adler: I will just take another moment on that and will not pursue it further because I suppose we could talk endlessly on the point. I invite your Honor's attention to a case which unfortunately I omitted to cite, a leading case on the subject, Watson against Jones in 13 Wallace 679, I believe, which involves this position: The Presbyterian Church——

Mr. Arkush: I don't want to interrupt Mr. Adler, but this witness has to get back to his Seminary and I will make a concession to Mr. Adler, which I think will cover any objection. I will concede that in the case of a denomination having what is called an episcopal or synodal form of government that the lower units, such as the parishes, are bound by the discipline, rules, usages and decisions of the higher judicatory. No church lawyer can dispute that. I say that does not apply in this case. In the first [fol. 94] place they have had no tribunals. There have been no adjudications before a tribunal. We are going to

show that later. In the second place, the political conditions in different countries under different forms of government require a modification of that doctrine.

[fol. 95] By Mr. Arkush:

Q. State briefly the history of the relations between the Church and the Government, starting with the Bolshevik Revolution in 1917.

A. This subject is too much——

Mr. Adler: I suppose my objection is on the record, and your Honor overrules it?

The Court: Yes.

[fol. 96] A. (Continuing) I should first be permitted to limit my exposition——

Q. Give just the background that led up to the so-called Renovated schism.

A. Yes. Since the very start of the October Revolution, October, 1917, the relations between the Church and the new revolutionary state was inimical. It was a clash from the very beginning, because the Bolshevik party, the party of the minority, who just seized the power in State, had against themselves the whole upper classes and the overwhelming masses of the population and the Church, not only on ecclesi-stical reasons but also the national. Besides the Bolsheviks were atheists in principle.

Mr. Adler: Yo see, your Honor, where that is leading to. We are going to get bogged down in a jungle.

The Court: It can't be too much of a jungle. He has got to get back to class.

A. (Continuing) I will try to be as brief as I can.

The Court: Go ahead.

A. (Continuing) The Bolsheviks were atheists who never hid their desire to exterminate the religion as a superstitution, as a backward——

The Court: As an opiate of the people. Let it go at that.

A. (Continuing) From the very beginning they were excommunicated by the Patriarch for their attacks on the Church and they themselves in the beginning of January issued the decree of the separation of Church and State, with the confiscation of the whole Church property. So

[fol. 97] the relations were inimical. And during the Civil War, which lasted for two years, many priests were executed. Nobody knows exactly the number, but thousands of them were executed, not only on pretext of political crimes, counter-revolution, but simply in revolutionary passions, by the organs of government, Tcheka, and so on. So the whole ecclesiastical people lived for years in the utmost fear of acute persecution. They had this conscience to be persecuted by the State, as in the Roman Empire, for example. Psychologically it is undeniable. So in this atmosphere, this Renovated schism can get its true illumination.

After five years, five years after the Revolution, Bolshevists invented a new measure in the struggle with the Church. This was the schism. They invented the schism within the Orthodox Church. They used the existing differences within the Church on high political, social and religious matters. Within this Church existed of course a liberal or even a revolutionary trend which was discontent with the more conservative policies of the Patriarch and the majority, but mainly it was the kernel of the Renovated Church, but mainly the members of this new Revolutionary Church moved by the terror and by the fear, by the desire to escape from the general law, general sort of persecution.

Mr. Adler: May I interrupt here?

The Court: Of course, a good deal of this is irrelevant, but it is easier to take it. It is not very important.

Mr. Adler: In the interests of protection of my position as counsel for the defendants, I would like my position to be known. I make a formal motion to strike out everything [fol. 98] that the witness has testified to, on the ground that it incorporates hearsay, conclusions, matters of controversial opinion, and it is irrelevant and immaterial in the case.

The Court: Of course, most of it is irrelevant and immaterial but there emerge just a few ultimate historical facts which are admissible.

The Witness: Everything is controversial about this Revolution.

Mr. Arkush: It is incontroversial——

The Court: I don't think it is important. I will let it

stand. I will entertain a motion to strike certain parts later.

By Mr. Arkush:

Q. Let us go on with the account.

A. In the spring of 1922, it was a question of the enforced confiscation of so-called Church valuables.

Mr. Adler: How far are we going to go? I mean such detail——

The Witness: It is very important, because——

The Court: We are up to 1922.

The Witness: Because the reason of the schism. The pretext of this confiscation was rather good, to——

Mr. Adler: How do you know it was a pretext?

Mr. Arkush: These are historical facts.

The Court: Of course, he is right.

The Witness: It is my appreciation.

Mr. Adler: There is another man who has another appreciation.

[fol. 99] Mr. Arkush: This is the opinion of an expert.

The Court: It is not important. All you are concerned with is the ultimate historical fact that there was a confiscation. Whether it was on a pretext or not——

Mr. Arkush: No, your Honor. This is coming directly into the arrest and imprisonment of the Patriarch and that was opportunity that the Renovaters took to grab and seize the Church. It is extremely important and established by all the historians.

Mr. Adler: I have many witnesses who can contradict this witness.

The Court: Contradict him as to the motivations, but you won't contradict him as to the ultimate historical facts, will you?

Mr. Adler: Yes, but I don't know——

The Court: Was there a confiscation? Was there an arrest of the Patriarch? That is all I am concerned with.

Mr. Adler: These are matters of statistics covering a vast territory. How can one man talk about one thing——

Mr. Arkush: I will bring it out.

By Mr. Arkush:

Q. There was a famine condition, was there not?

A. Yes.

Q. As a result of that famine, the Government asked the Church to contribute to the relief of the sufferers?

A. Not asked, ordered them.

Q. Compelled them. And the Patriarch concurred with that, except——

A. The Patriarch offered to do it voluntarily, but instead [fol. 100] of the voluntarily giving up of these valuables, there was issued a decree by the Government confiscating all the valuables and sacred things.

Mr. Adler: May the record show that I have a running objection to all this testimony and I further request that Mr. Arkush ask the witness questions and not ask a question which will permit the witness to talk for hours?

Mr. Arkush: I am willing to do that. I just thought I would save time.

The Court: At this time I will overrule the objection and reserve to the defendants the right, after this witness is finished, to move to strike out certain portions of his testimony. I think that will be the most feasible method of proceeding.

Mr. Arkush: Is it your Honor's wish that I question him or permit him to go on?

The Court: You can do anything you want. I am definitely of the opinion that a good deal of this is irrelevant and incompetent, but I think it is simpler to take it and strike it out later, in view of the fact that there is no jury here.

By Mr. Arkush:

Q. Confine yourself to yes or no unless you think you should explain it. As a result of the Government's decree, were there wholesale and universal seizures in the Church of the icons and other valuables?

A. Yes.

Mr. Adler: I must protest.

Mr. Arkush: It is a historical fact.

[fol. 101] Q. And did many of the priests——

Mr. Adler: I am sorry. I must press that objection.

The Court: I overrule your objection specifically to this question. You still have the right to move to strike the preceding part.

Q. And did many of the priests resist?

A. Some of them, particularly, not priests, but the people, the believers resisted.

Q. Did many arrests arise as a result?

A. Many arrests, trials, and capital punishment.

Q. Were you present at one of those trials?

A. Yes.

Q. Which one?

A. In Petrograd, the trial of Benjamin, the Metropolitan with many priests and laymen.

Q. He was shot as a result of that?

A. He was shot.

Q. And that is a very famous event in Russian Church history?

A. Yes.

Q. Mentioned in all the books?

A. Yes. This moment was used by a group of radical revolutionary priests for a coup within the Church. The Patriarch was arrested and imprisoned but many of these priests belonging to the Living Church—it was a party within the Church, an organization—was admitted to a parley—of course by the Government, otherwise they could not go to the prison—and as a result of the parley, the Patriarch issued a letter, very short, giving him the right to pass over the papers.——

Q. Arrange?

A. Arrange—no, pass over the documents of the Patriarchal Government to the Bishop Agafangel, whom the [fol. 102] Patriarch nominated, elected as his locum tenens. But this group of the priests declared themselves the temporary government of the Church, High Church Government.

Q. It is usually referred to in the books as the H.C.A., High Church Administration?

A. Yes, High Church Administration, and that was the origin of this schism. In the utmost fear of the terror, most of the churches were enforced or forcibly transferred to

this group, in spite of the fact that this group had very few adherents among the population, the believers.

Q. Is it a historically established fact that if the priests or other officials of any particular parish would not adhere to the H.C.A., then the Government would proceed against them?

A. They were arrested and exiled, and so on. Some of them were shot, of course.

Q. Then this H.C.A. would appoint people to take their places, isn't that right?

A. Of course, of course.

Q. Who would be sympathetic to the H.C.A.?

A. Yes.

Mr. Adler: The same objection.

Mr. Arkush: I understood that he had a blanket objection to all this. He is just wasting time taking a specific objection.

Q. What did the H.C.A. then proceed to do? Did they proceed to call a Sobor?

A. They tried to introduce many reforms within the Orthodox Church which were not conformed to the canons of the Church, a married episcopacy, for instance, and so on. The next year, 1923, they gathered at that Sobor of which it was spoken here.

Q. Right.

A. In this Sobor——

[fol. 103] Q. Did the Patriarch himself call that Sobor?

A. No.

Q. Did he authorize——

A. Because this Sobor declared Patriarch deposed, this Sobor.

Q. Wait a minute, before you get to the Sobor. You say the Patriarch did not call this Sobor?

A. No.

Q. Did he authorize it to be called?

A. No.

Q. Did he instruct it to be called?

A. No.

Q. He was still under arrest?

A. Under arrest.

Q. And these Renovaters, so to speak, this H.C.A., they took it upon themselves to call the Sobor?

A. Yes.

Q. Of 1923?

A. Yes.

Q. All right. Will you read into the record the resolution as to communism which was passed by that Sobor?

Mr. Adler: Well, your Honor——

Mr. Arkush: I think this is very important.

The Court: Is it part of any exhibit?

Mr. Arkush: It hasn't been introduced yet. It is in this appeal book, or you can find it in your book.

Q. Can you find it in your book, Professor?

A. Here it is.

Q. Well, you read it, or perhaps I will read it. That will be easier.

Mr. Adler: I have my objection to that?

The Court: Is that in evidence?

Mr. Arkush: Not yet. It is in evidence in the old case. The minutes of this Sobor are official documents that have been published.

[fol. 104] Mr. Adler: In the old case, in the Kedrovsky case, the minutes of the Sobor of 1923 were introduced in evidence. The plaintiff relied upon them. The Court examined that question and it upheld the plaintiff's right to a due appointment. Now, he is trying to use an exhibit which was introduced in the other case, which supported the due appointment, to show that the due appointment was not due. In other words, he is trying to overrule the Appellate Division and the Court of Appeals.

Mr. Arkush: That is not the purpose of the offer. The purpose of the offer is to show that this Church in America, in Detroit, in 1924, was declaring itself temporarily autonomous because, with the support and collaboration and collusion and connivance of the Bolshevik Government, all Church authority, effective Church authority in Russia was put in the hands of these Renovaters, and these Renovaters at their own Sobor said these words, and I want to get these words in, your Honor. They are in their official minutes.

Mr. Adler: Your Honor, no civil court in the land will ever say that a part of a church has the right to secede because the reason why people secede is a matter for their own consideration, good or bad. The question is, did they secede? That is all.

Mr. Arkush: We did not secede.

Mr. Adler: The act controls that. The reason why is another thing. One man might have had reason A, another man reason B. We can't go into the multitudinous reasons——

[fol. 105] The Court: Is there any question as to the authenticity of the document?

Mr. Adler: No, I don't think so.

Mr. Arkush: Then I offer the proceedings of the Sobor of 1923 as printed in the proceedings in the so-called Kedrovsky case.

Mr. Adler: We are just cluttering up the record with a lot of stuff that has no bearing.

The Court: I agree with you it is completely irrelevant and immaterial to the plaintiff's prima facie case, but I think it is relevant and material to the issues raised by your affirmative defenses and since I think by this time the record clearly indicates that, as I said before, we are crossing party lines here, and in some measure anticipating defenses and in other measure rebutting ahead of the orderly procedure defenses which have been partially raised by the cross-examination of the preceding witness, I think that this is material. Probably nine-tenths of it is not very consequential to the issues here, but if he wants to offer it I can't start sifting it at this time.

Mr. Adler: Well, may I leave this final thought: On due consideration, I don't think your Honor will enter into the question whether the secession by this group, or any other group, was actuated by proper or improper motives.

The Court: Oh, no, I don't care. I have made it clear.

Mr. Adler: That is what he is going into. He says they [fol. 106] seceded because of Communism or something else. I say the "because" is irrelevant.

The Court: No, I am just interested in the ultimate historical, chronological facts here, which will establish something equivalent to a chain of title for the American Dio-

cese. Isn't this a question of which is legitimate and which is pretender? Isn't that it?

Mr. Adler: Yes, that is one of the basic questions here.

The Court: I think that to resolve that we have to take all of these previous Sobors or conventions into consideration—there has to be a chronology—starting with the Bolshevik Revolution.

Mr. Adler: On that theory then we ought to have a statement of facts, not a lot of opinions.

The Court: I should think a stipulation by you gentlemen would have sufficed.

Mr. Adler: If your Honor thinks it is relevant——

Mr. Arkush: My experience is that you will waste a great deal of time on a stipulation. We have a qualified historian here.

The Court: All right, proceed.

Mr. Arkush: I offer the extracts from the 1923 Sobor.

Mr. Adler: Don't offer the whole thing. Why don't you pick the part you want?

Mr. Arkush: I will assure you that if there is an appeal here we will just pick out the relevant portions. I don't want to take the time while the Professor is on the stand to pick out portions.

[fol. 107] Mr. Adler: My objection is noted on the record.

The Court: The objection is overruled, since it does not go to the authenticity of the document.

Mr. Adler: I object on the ground it is irrelevant and immaterial, and so on.

The Court: You are not objecting on the ground it is incompetent, but on the ground that it is immaterial and irrelevant?

Mr. Adler: That is right, immaterial and irrelevant, not incompetent. That is my error.

Mr. Arkush: It is the matter printed as an exhibit, beginning on page 493 and ending on page 543 of the Appeal book in the so-called Kedrovsky case.

Mr. Adler: Well, no, Kedrovsky——

Mr. Arkush: Kedrovsky v. Rojdesvensky.

(Received in evidence and deemed marked Plaintiff's Exhibit 6A.)

By Mr. Arkush:

Q. Was Patriarch Tikhon accorded an ecclesiastical trial by the Sobor?

A. When this resolution was presented to him——

Q. No, no, I don't think you got my question. Just answer yes or no.

The Court: What is the materiality of that?

Mr. Arkush: The deposition of Tikhon was invalid.

The Court: I know. He was reduced to his lay status. So what?

[fols. 108-109] Mr. Arkush: That was one of the moving causes of the autonomy at the Sobor in Detroit, because their loyalty to the Patriarch has never wavered from that time to this.

The Court: But is it my function to inquire into the reasonableness of the action of the Detroit Sobor?

Mr. Arkush: I think so.

Mr. Adler: For a civil court to do that?

Mr. Arkush: Not at all. Mr. Adler appears here to enforce the binding letter of these 1917-1918 Statutes on the American Church, although political conditions made that absolutely impossible and impracticable.

(Discussion ensued off the record between the Court and counsel.)

By Mr. Arkush:

Q. Isn't it true that one of the Renovaters himself wrote a book as to the history of the Renovated Church?

A. Yes, Professor Titlinoff, yes.

Q. Do they not in that book admit the support of the Russian Government?

[fol. 110] By Mr. Arkush:

Q. I want to ask a simple question and if you don't understand me, ask the interpreter. Did the 1923 Sobor accord to Patriarch Tikhon a trial before they deposed him?

A. No, there was no trial.

Q. That Sobor set up——

The Court: That, for example, is a fact which I think he

is qualified to testify to and which I can receive as evidence, even though it may be hearsay as far as the witness is concerned. That is a historical fact, but a good deal of the other material I am very doubtful about.

Q. Did Patriarch Tikhon later issue a public statement repudiating all the Acts of the 1923 Sobor and of the Renovaters?

A. He wrote "Invalid, Patriarch Tikhon."

Q. He wrote "Invalid" on what?

A. On the decree of the Sobor, the resolution of the Sobor, which was presented to him.

Q. Did the 1923 Sobor and their moving spirits set up a High Church Administration?

A. I am sorry.

Q. (Repeated through the interpreter.)

A. Yes, under the name of Synod.

Q. Holy Synod?

A. Holy Synod.

(Discussion ensued off the record between the Court and counsel.)

By Mr. Arkush:

Q. Now, relate very briefly what happened later as regards the Renovated schism on the one hand and the old Patriarchal Church on the other.

[fol. 211] A. Soon after the Sobor the Patriarch was released by the Government, released because the Bolshevists in their newspapers declared that they are no more interested in the victory of one Church party, that all parties, all religious parties were equally bad.

Q. About what date was that?

A. It was in the same year, 1923, some months after the Sobor. They had to use the schism, the fact of a schism in itself. They preferred to have two churches instead of one.

Mr. Adler: Who is they?

Mr. Arkush: The Government.

The Witness: The Government.

Mr. Adler: How do you know what the Government wanted? I would like to know that.

The Witness: They explain it in the papers at that time.

A. (Continuing) The Patriarch when he was in relative freedom—he was not quite free, he was confined in the Monastery——

Q. What they call "house arrest?"

A. He was confined in a Monastery, but he could communicate with believers—recovered practically all of the Churches which went over to the Renovators. Two-thirds of the Churches returned to the Patriarch. Only one third remained under the Synodal regime. So the general opinion of the Church was clear.

Q. When did the Patriarch die?

A. 1924, 1925.

Q. I have your book before me. It says March 8, 1925.

A. 1925, yes.

Q. Was a successor Patriarch immediately elected, yes or no?

A. No.

[fol. 112] Q. When was the next date that a successor Patriarch came into office?

A. Now it is difficult to say, because Patriarch named three Bishops who were arrested.

Q. No, I am not referring to them. When was the next Patriarch?

A. During the war, in 1943, I think, or 1944.

Q. 1943 or 1944. Archbishop Leonty has testified 1944.

A. 1944, yes.

Q. So there was no Patriarch between the death of Tikhon and the appointment or election of Sergius in 1943 or 1944?

A. That is right, for a period of twenty years.

Q. In the terminology of the Russian people and the Government and the Church Authorities, what is the significance of the word "Counter-Revolutionary"?

Mr. Adler: Well——

Mr. Arkush: Just a minute. Your Honor, that is the appelation that is given to Metropolitan Platon in that document that is in evidence.

A. In the language of the Bolshevik Party, everybody who doesn't accept the program is Counter-Revolutionary, of course, including Socialists, Mensheviks, they are called, of different nuances.

Q. Does the word imply active aggression or the use of physical force?

A. Not only that, but disagreement and opposition of opinion.

Q. Any intellectual disagreement is considered counter-revolutionary, is that right?

A. Yes.

Q. So that if a priest, layman, or bishop simply expressed disagreement with the principles of Communism he would be designated a counter-revolutionary?

A. Certainly, even if they did not express their——

[fol. 113] Mr. Adler: Of course——

Mr. Arkush: I am interpreting a word that is in evidence, your Honor.

Mr. Adler: My objection, I suppose, runs against all this testimony throughout. I don't want my failure to speak to indicate any acquiescence on my part. I merely fail to speak out of deference to the rulings of the Court.

Q. Somewhere in your book, I forget where, Professor Fedotov, you make the remark that under the Russian civil law, a parish, or what you refer to as Twenty, the Twenty, had the option of choosing what denomination they wanted to belong to or calling what kind of a priest, or if they wanted, a rabbi, or a Mohammedan clergyman, to be their pastor, is that right?

A. According to the Soviet law. Soviet law doesn't recognize any Churches, only cultural associations of twenty people, who certainly have the right to choose their religious creeds and so for.

Mr. Arkush: I am going to ask your Honor, under the recent amendment of the Civil Practice Act, 344-A, to take judicial notice of the following ordinance issued by the People's Commissariat of the Interior of the R. S. F. R. S., which is the Russian Soviet Republic.

Mr. Adler: What date is that?

Mr. Arkush: That is 1929. I will give you the official citation. It is published in the Fordham Law Review, January, 1939, page 8, footnote 43.

[fol. 114] "Resolutions and Orders of the religious conventions, conferences and their executives Bodies can be

carried out only by way of voluntary execution by the faithful."

[fol. 115] Archbishop Leonty Turkevich, resumed the stand and testified further as follows:

Cross-examination.

By Mr. Adler (Continued):

Mr. Adler: I want to offer in evidence the following portion of the resolution of the Detroit Convention of 1924——

Mr. Arkush: It is all in.

The Court: Aren't the entire minutes of that convention in, all the resolutions?

[fol. 116] Mr. Adler (Reading): "Whereas, under the laws and rules of said Russian Orthodox Greek Catholic Church and of said Diocese"—we can stipulate that that refers to the American Diocese?

Mr. Arkush: I think so.

Mr. Adler: Yes. (Continuing reading)—"the Ruling Archbishop of said Diocese held legal title to all properties, holding title to the parish properties in trust solely for the respective parishes and title to Diocesan properties in trust for the Diocese, and the North American Ecclesiastical Consistory, properly called Ecclesiastical Board, and later Diocesan Council, was but an advisory body acting under said ruling Bishop, with no power to bind the said ruling Bishop, and of which the ruling Bishop was not a member and had no title to or control over any Parish or Diocesan properties."

Q. You were going to look something up for me last night. Did you find what you were looking for?

A. No.

Q. You couldn't find it

A. I couldn't find it.

Q. You are now a bishop, are you not?

A. Yes, sir.

Q. When were you consecrated?

A. In 1933.

Q. By whom?

A. Metropolitan Platon.

Q. And whom else?
A. Bishop Theophilus.
Q. Yes.
A. And Bishop Alexis.
Q. Bishop Alexis?
A. Yes.
Q. With what Church is Bishop Alexis connected?
A. With our Church.
[fol. 117] Q. Was your consecration as a Bishop confirmed by any Church body, any Church organization?
A. Only by Synod of Bishops.
Q. Only by the Synod of Bishops in this country?
A. In this country.
Q. It was not confirmed by any other Church authority?
A. No.
Q. You recall, don't you, that the enactments of the Sobor of 1917, which you said were binding, required that confirmation of Bishops be by the Supreme Church Authority in Russia? You recall that?
A. Yes.
Q. But you didn't follow that provision?
A. On the occasion of Church disorders outside America.
Q. First we will come to the fact and then the explanation. The fact is that you did not follow that?
A. No.
Q. And you justify that failure to follow that because of Church disorders, is that your view?
A. Yes.
Q. In 1933 you claim there were Church disorders in Russia?
A. We followed the Ukase of 1920.
Q. We followed the Ukase of 1920?
A. Yes.
Q. You know that in 1933 the United States Government recognized the Russian Government, don't you?
A. Yes.
Q. That was about the time you were consecrated a bishop?
A. Yes.
Q. And diplomatic relations with Russia had been established?
A. But not Church.

Q. Wait a minute. Diplomatic relations had been established?

A. Certainly.

Q. And do you recall that one of the conditions of the recognition of the Soviet Union by this country was that [fol. 118] the Soviet Government guarantee religious freedom to everybody within their territory? Do you recall that?

A. May I——

Mr. Arkush: That isn't so.

A. (Continuing) May I explain?

Q. No. Do you recall first? Do you remember that, that one of the conditions for the recognition of the Soviet Union by this country was that the Soviet guarantee religious liberties?

The Court: (Addressing interpreter) Repeat that to him.

(The question was repeated through the interpreter.)

A. Yes.

Q. You recall that?

A. (Through interpreter) Yes, I remember that religious freedom would be guaranteed.

The Court: No, ask him if he also remembers whether that was a condition laid down by this Government before it would recognize the Soviet Union. That is the second part of the question.

(The question was repeated to the witness through the interpreter.)

The Witness: Yes, I remember.

By Mr. Adler:

Q. Now, isn't it a fact that your consecration as a bishop was confirmed or was referred for confirmation to the Synod of the refugee bishops of Karlovitz?

A. No.

Q. It was not?

A. No.

[fol.119] Q. Did you as an official of your Church recognize the authority of the Synod of Karlovitz?

A. Not that time.

Q. At any time?

A. Not that time.

Q. Well, 1933 means you did not then?

A. No.

Q. Did not recognize it?

A. Did not recognize it.

Q. Isn't it a fact that at the convention in 1934 where Bishop Theophilus was appointed head of your Church that relations were established with the Synod of Karlovitz?

A. After the Sobor of Cleveland?

Q. Yes.

A. In 1936.

Q. 1936, was it?

A. 1936.

Q. That was the first time that your Church gave recognition to the refugee bishops in Karlovitz?

A. (Nodding yes.)

Q. Now I want to clear up the question of the payment of the taxes by you. While you were Dean of the Cathedral from 1906, let us say, to 1917, you paid the taxes and water rates and paid for the supplies for the Cathedral?

A. Yes.

Q. That was your job, part of your work as Dean?

A. Yes.

Q. (Through interpreter) Where did you get the money for that?

A. (Through interpreter) We made collections in the church.

Q. Yes, but the collections in the church were used for the purpose of paying these charges, were they not?

A. Yes.

Q. And you said, I think, that these taxes and water rates and so on were paid by check?

A. Yes.

Q. By whose check?

A. The name of——

Q. Bishop?

A. No.

[fol. 120] Q. (Through interpreter) Whose check?

A. (Through interpreter) They were the checks of our church, Saint Nicholas Church.

Q. Saint Nicholas Church?

Mr. Arkush: That was not the translation. It was Saint Nicholas Cathedral.

Q. In other words, there was an account in the name of Saint Nicholas Cathedral?

A. Yes.

Q. Who opened that account? A. (Through interpreter) I opened that account together with the First Assistant Priest.

Q. And did you sign the checks?

A. Yes.

Q. Did you open that account under the direction of the Archbishop?

A. (Through interpreter) Everything was done according to his orders.

Q. (Through interpreter) When you came back from Russia from that Sobor of 1917 you resumed your duties as Dean, say, in 1918, did you not?

A. Yes.

Q. (Through interpreter) And this account was continued through 1918 up to 1926, was it not?

A. It seems to me so. I think so.

Q. So that after this corporation was organized in 1925 you continued, after the incorporation, to pay the taxes and the dues in the same manner from the Cathedral account which you had had for years before? That is the fact, isn't it?

A. That is the fact.

Q. You don't mean to convey the impression that you used the money of this corporation to pay the taxes, do you?

A. No.

Q. All right. You used the collections in the Cathedral to pay the taxes after 1925, just as you did for so many years before?

A. Yes.

[fol. 121] Q. As a matter of fact, the corporation had no money at all?

A. But the corporation exists.

Q. I understand. But you can exist poor, you know.

(Through interpreter) The corporation had no money when it was organized, did it?

A. (Through interpretr) The organization helped us in other manners, in other ways.

[fol. 122] Q. I ask you whether you know whether the corporation contributed any money for the maintenance and upkeep of the Cathedral at any time since its organization?

A. (Through interpreter) I don't think they ever gave anything directly, but through other people, wholly their assistance.

Q. You mean the corporation asked other people to contribute to the Cathedral?

A. (Nodding yes.)

Q. But the Cathedral itself never gave a penny to the corporation, isn't that so?

Mr. Arkush: I don't know what that means, the Cathedral never gave a penny to the corporation.

Mr. Adler: I am sorry.

The Court: You meant it the other way around.

Mr. Adler: I meant it the other way around.

A. (Through interpreter) No money directly.

Q. The corporation never had a penny to give, isn't that so? (Through interpreter)

A. I don't know.

[fol. 123] Q. Now, after you came back from Russia in 1918 you found in possession of the Cathedral a man by the name of Bishop or Archbishop Alexander?

A. Yes.

Q. Then he invited Archbishop Platon, didn't he, around 1920, 1921, or 1922, along those years?

A. About that.

Q. Then Archbishop Alexander left and Archbishop Platon remained?

A. Yes.

Q. And Archbishop Platon remained from 1922 to 1926 when by virtue of the Kedrovsky decision he left?

A. Yes.

Q. So Archbishop Platon remained, let us say, in 1923 and 1924 in the Cathedral? He was in possession?

A. (Nodding yes.)

Q. He remained in possession throughout 1925 too, didn't he?

A. Yes.

Q. (Through interpreter) This corporation was organized in April, 1925. Was there any change in possession after the corporation was organized or did the possession of Platon remain as before?

A. (Through interpreter) Platon remained the active chairman of the corporation.

Mr. Adler: Will you stipulate, Mr. Arkush, that the opinion of Judge Ford in favor of Archbishop Platon was handed down on December 24, 1924?

Mr. Arkush: If you say so.

Mr. Adler: It appears in the record. And that the notice of appeal from the judgment was filed or served about January 28, 1925?

Mr. Arkush: Yes.

Mr. Adler: And that the Appellate Division decision of reversal came down around October, 1925?

[fol. 124] Mr. Arkush: Subject to verification of those dates.

Mr. Adler: Yes.

All right.

Re-direct examination.

By Mr. Kilroe:

Q. In answer to a question a short time ago you stated that between Sobors, that is, the Sobor of 1918, made no provision for rulings by High Church Authority, isn't that right?

Mr. Adler: I don't think there was any such testimony, your Honor.

Mr. Kilroe: That is between Sobors—this was his answer—the Sobor of 1918 made no provision for action of any kind by Church Authorities for the change of any canonical rule. Wasn't that your question?

Mr. Adler: I don't think so.

The Court: There was testimony about extraordinary circumstances.

Mr. Arkush: My recollection of the question is this: Mr.

Adler asked the witness whether the High Church Authorities between Sobors were empowered to take action which was inconsistent with the Statutes of 1917-18. The witness said he thought that there was a provision on that, and your Honor then adjourned so as to give him an opportunity to find it.

Mr. Adler: And today he said he couldn't find it.

The Court: That is right.

By Mr. Kilroe:

Q. Isn't there a general principle in the Orthodox Church that any canon or rule can be suspended if practical neces-
[fol. 125] sity requires it?

A. Well, yes.

Q. What is the name of that rule?

A. We call that Church economia.

The Court: By whom can these rules be suspended?

The Witness: Who is left as the head of the body of the Church.

The Court: (Through interpreter) The head of any constitutent diocese can change it?

The Witness: (Through interpreter) The one at the head of the Church.

The Court: Does that mean the Patriarch or the High Church Authority?

The Witness: Yes.

The Court: All right.

By Mr. Kilroe:

[fol. 126] Q. In April, 1945, when this action was started, was the defendant John Kedroff a member of your Church?

A. No.

Q. Was he a priest in your Church?

A. John Kedroff?

Q. Yes.

A. He was——

Mr. Adler: Are you talking about the defendant.

Mr. Kilroe: I am talking about the defendant.

Q. The defendant in this action?

A. No, he is not a member of our Church.

[fol. 127] Q. Well, in 1944, do you know what Church he was connected with?

A. Living Church.

Mr. Kilroe: Will you stipulate for the record that when this action was started by the plaintiff, the defendant, John Kedroff, was not a member of the——

Mr. Adler: I think so. Let us first fix the date when the action was started. I think, Mr. Arkush, you said April.

Mr. Arkush: I think so, April 9, 1945.

Mr. Adler: I will stipulate that the defendant, John Kedroff was not at that time a member of the group to which the witness belonged.

Mr. Kilroe: And will you further stipulate that at that time he was in possession of the Cathedral and the Cathedral's property?

Mr. Adler: No, that is another matter.

By Mr. Kilroe:

Q. Well, in 1945, when this action was started do you know who was in possession of the Cathedral and the Cathedral's property?

Mr. Adler: That is objectionable. That is calling for a conclusion.

The Court: Sustained.

Mr. Kilroe: I now offer in evidence an injunction in the action of John S. Kedrovsky against Saint Nicholas Cathedral of the Russian Orthodox Church in North America, dated June, 1926.

The Court: 1926?

Mr. Kilroe: Yes.

The Court: What materiality has that?

[fol. 128] Mr. Kilroe: This has——

The Court: It is after the action.

Mr. Kilroe: It has this materiality, your Honor: That John Kedrovsky brought an injunction against this corporation restraining them from interfering with the Church property, the Cathedral. This action never was terminated. It started and lapsed, but the injunction did not. Consequently this injunction lasted up until the date of John S. Kedrovsky's death, which carries us up to 1934, and that is the reason I am offering this.

The Court: What is the materiality?

Mr. Arkush: It tolls the statute, under Section 24 of the Civil Practice Act.

Mr. Adler: I don't see how an injunction——

Mr. Arkush: Section 24 provides that if an action is restrained by an order that the statute is tolled.

The Court: Is that certified?

Mr. Kilroe: No, but I can get it certified.

Mr. Adler: I don't raise any objection about that.

Mr. Arkush: It is the file copy, your Honor. May it be deemed marked?

The Court: It is offered solely for the purpose of tolling the statute?

Mr. Arkush: Yes.

The Court: I will receive it for that purpose. You may have an exception.

(Received in evidence and deemed marked Plaintiff's Exhibit 7.)

Mr. Kilroe: That is all, your Honor.

(Colloquy)

[fol. 129] By Mr. Adler:

Q. You mentioned the doctrine of economia before.

A. Yes.

Q. Are you familiar with that doctrine? Just yes or no.

A. Yes.

Q. In a general way?

A. In a general way.

Q. That doctrine of economia is not found in any printed book or text, is it? (Through interpreter)

A. Yes, I have it in every religious manual.

Q. (Through interpreter) The doctrine of economia is set forth in a religious manual?

A. (Through interpreter) Yes, it is contained in religious manuals.

Q. You don't have that religious manual with you, do you?

(Discussion ensued off the record between Court and counsel.)

Mr. Adler: As I understand it, the doctrine of economia is a rule which, like custom and usage, is applied in Orthodox Churches.

Mr. Arkush: Yes.

Mr. Adler: Now we will find out what the doctrine is.

By Mr. Adler:

Q. Isn't the doctrine of economia simply this: That in a difficult case, in exceptional circumstances, the Chief Church Authorities of a Church may stretch the rules a little bit? Isn't that so?

A. Yes.

Q. (Through interpreter) That is right. But that doctrine does not give the power to a bishop or a diocese to break the rules of the Church, does it?

[fol. 130] A. (Through interpreter) Yes, if there are orders from High Authorities to change it.

Q. Naturally, if the Supreme Church Authority gives me permission or orders me to do it I can do it, but first there must be the authority of the Supreme Church Authority?

A. Certainly.

Mr. Adler: All right.

(Witness excused.)

COLLOQUY

Mr. Adler: Now a word about this injunction. I believe——

Mr. Kilroe: We also have a photostat of the docket entries which had better go in to show the precise status of the action.

Mr. Adler: I will take your word for it.

Mr. Arkush: We have a photostat of it.

Mr. Adler: Tell me what it is. I will take your word for it.

Mr. Arkush: Let us put it in.

We offer the photostatic transcript of the docket entries in the action of John S. Kedrovsky vs. Saint Nicholas Cathedral of the Russian Orthodox Church in North America. May that be marked?

Mr. Adler: I have no objection.

(Received in evidence and marked Plaintiff's Exhibit 8.)

Mr. Adler: All that shows is that nothing happened after this injunction was granted, is that right?

Mr. Kilroe: That is right.

Mr. Arkush: There were two injunctions in effect. There was the personal injunction of Kedrovsky against Platon, Turkevitch, their agents and servants, against interfering [fol. 131] with the occupancy of the Cathedral by Kedrovsky. That is already in. We think that under the doctrine of disregarding the corporate entity your Honor would hold that that enjoined Platon, so long as he lived and continued as head of the plaintiff corporation, from interfering with the occupancy of the Cathedral by Kedrovsky so long as he lived. So we really don't need this order. But this order is cumulative.

[fol. 132] Mr. Adler: In other words, this injunction runs not in favor of Kedrovsky as an individual, but in favor of him as Archbishop, and consequently in favor of X, Y, Z, who may be Archbishop. So this is really——

Mr. Arkush: There is no dispute about that.

I would like to offer in evidence Finding No. 5 in the Kedrovsky case, which, incidentally, was submitted by the defendant Platon himself, who has been succeeded by the [fol. 133] Bishop Theophilus, who is the head of this present plaintiff, and which reads as follows—it is short, I will read it. (And this finding was not disturbed by the Appellate Courts at all)—"Title to the premises No. 13-15 East 97th Street, Borough of Manhattan, City of New York, are in the Russian Orthodox Saint Nicholas Cathedral, a domestic religious corporation, subject to a trust, for the uses of said Russian Orthodox Church, and the members thereof, according to the canons and rules of said Church, pursuant to which the Ruling Archbishop, or Archbishop of the North American Diocese is entitled to occupy the residential portion thereof as a dwelling, and to occupy the portion used for the Cathedral for the purpose of conducting religious services, and other official activities, the custody of the Cathedral portion being held by an officer known as the Dean of the Cathedral."

Mr. Arkush: The only trouble with that, your Honor,

is this: That there is no such corporation as that mentioned in this finding.

Mr. Adler: Oh, yes, there is.

Mr. Arkush: I beg your pardon. And it evidently was an inadvertent error made by counsel or perhaps a stenographic slip. The only evidence before the Court in that case as to a corporation holding title was evidence as to Russian Orthodox Saint Nicholas Church in New York, the certificate of incorporation of which was before the Court.

Mr. Adler: Yes, that is right.

[fol. 134] Mr. Arkush: Are you offering in the chain?

Mr. Adler: Yes, but we can stipulate it.

The Court: All right, read it into the record.

Mr. Adler: Yes.

Title to the premises in question was conveyed to a religious corporation known as Russian Orthodox St. Nicholas Church in New York. That is right, is it not?

Mr. Arkush: Right.

The Court: What is the date of that?

Mr. Arkush: It is dated November 3, recorded December 12, 1899.

Mr. Adler: I think that is right.

Then there was a conveyance by this corporation of this Cathedral to Evdokim Merschersky as Archbishop of the——

Mr. Arkush: Archbishop of Aleutia and of North America, of the Christian Orthodox Catholic Church of the Eastern Confession in North America.

[fol. 135] The Court: Have you got the date of that?

Mr. Arkush: Yes, sir, that is dated April 12, recorded April 17, 1916.

Mr. Adler: This conveyance being from a corporation to an individual had to have the consent or the permission of the Supreme Court.

The petition of the corporation and the supporting affidavit of the Archbishop Evdokim and the supporting affidavit of a priest, Kohanik, with exhibits attached thereto, set forth the reason for this conveyance from the corporation to the Archbishop. The reasons set forth are most instructive and I think decisive of a fundamental branch in the case and these documents, the order of the court, and

the supporting affidavits I offer in evidence. They appear on pages 571 to 591 of the record on appeal in the Kedrovsky case heretofore referred to.

You don't object to that, I assume?

Mr. Arkush: No.

The Court: It will be received.

(Received in evidence and marked Defendants' Exhibit F.)

Mr. Adler: May I say a word about that initial corporation which held title to it?

That corporation was organized under sections of the Religious Corporations Law which permitted the incorporation of a church of the Eastern Confession by the Envoy Extraordinary and the Russian Consul General duly accredited in the United States.

[fol. 136] The Court: That is the Ambassador?

Mr. Adler: I am using the language of the statute.

Mr. Arkush: Let us put that in, the certificate of incorporation.

Mr. Adler: The certificate of incorporation is part of the moving papers.

Mr. Arkush: Did you put that in?

Mr. Adler: That is all in there.

That same statute, which I think is now Section 91 of the Religious Corporation Law, says that the Ambassador and the Russian Consul General shall be the trustees of such a corporation.

Pursuant to that law, this original corporation was incorporated by the Russian Ambassador and the Russian Consul General, and they were the trustees of that corporation from 1899 to 1916. They held title to that corporation.

For a period of 17 years or so this corporation held record title to the Cathedral.

The petition and the supporting papers for permission to transfer to the Archbishops say this: That by custom of the Eastern Church, title to real property is held in the name of the Archbishop, and they say that many of the properties of the Diocese are so held by the Archbishop; that although record title is in the name of this corporation, the corporation has been wholly inactive, has held no

meetings at all, and that the management and control and administration of the Cathedral was in the hands of the Archbishop and his Council, and that they are the actual [fol. 137] owners, the Archbishop and his Council are the actual owners of this Cathedral, and that the title of this corporation is a naked one, without any beneficial interest in that corporation.

That is attested to by the Ambassador and the Russian Consul General and by the Archbishop and by the supporting priests. On these grounds, the court said, "All right, transfer the title to the Archbishop".

The Court: All right, we have it to the Archbishop. What is the next step?

Mr. Adler: One other observation. That transfer to the Archbishop from the corporation was not a gift to the Archbishop. It was a recognition of the actual realities, and this corporation didn't pay a penny for the deed, because that money had been contributed by Russia, and so on.

Mr. Arkush: And from America.

Mr. Adler: All right. And from America.

The next conveyance was—will you help me on that?

Mr. Arkush: Evdokim Meschersky, etc., to the Russian Orthodox Saint Nicholas Church in New York, dated February 6, recorded May 8, 1917.

Mr. Adler: It wasn't 1926.

Mr. Arkush: I said February 26th, recorded May 8, 1917.

Mr. Adler: That is right. In other words, about a year later, the Archbishop retransfers that back to the old corporation.

Of course, we must remember that the Kerensky Revolution had occurred in February and he was going to go back [fol. 138] to Russia, so he didn't want the title in his name and he gave it back to the corporation.

The Court: All right. What is the next step?

Mr. Adler: The next step is for them to prove, namely, a conveyance by this corporation to the plaintiff in April of 1925.

[fol. 139] Mr. Kilroe: I now offer in evidence a deed from the Russian Orthodox Saint Nicholas Church in New [fols. 140-143] York to the plaintiff corporation.

Mr. Adler: Now, your Honor, I think this is an important point.

Mr. Arkush: It has already been marked for identification as a plaintiff's exhibit.

[fol. 144] Mr. Adler: I would like to object to the introduction of this deed on the following grounds:

1. No evidence was presented that Mr. Oustinoff, who executed the deed on behalf of the corporation, plaintiff's grantor, was authorized to execute the deed. There has been presented no resolution of the board of directors or trustees of that corporation, authorizing the execution of the deed, and there has been presented no minutes of any meeting authorizing that transaction.

Second, it appears from the record, that the corporation, the plaintiff's grantor, the Russian Orthodox Saint Nicholas Church in New York, plaintiff's grantor, had no beneficial interest whatever in the Cathedral and was the mere custodian of the title, or, perhaps more accurately stated, bailee of the title, in the same way in which I give a man a book and say, "Hold the book for me."

The Archbishop told the corporation, "Hold this title for me."

In these circumstances, Mr. Oustinoff had no power to alienate title to the Cathedral to anybody other than the accredited Archbishop of the Archdiocese, appointed by the Supreme Church Authorities in Russia.

Now, the deed purports to be given to the plaintiff corporation, the head of which is Platon Rojdesvensky, who [fol. 145] was held in the Kedrovsky case not to be an Archbishop of the Archdiocese. Consequently, it appears on the face of the record that the transfer of the deed to the plaintiff is a diversion of the trust on which the corporation held the deed and consequently is void.

The Court: That issue can only be determined at the end of the entire case, but you may make your objection.

Mr. Adler: For my own protection and the protection of my rights.

Third, the deed is invalid because at the time it was executed in April, 1925, Oustinoff was no longer a trustee of the corporation under Sections 91 and 92 of the Religious Corporation Law, notwithstanding his recognition in

1925 by the State Department for diplomatic reasons as still Consul General.

Fourth, the deed is invalid because it lacks the signature of the Russian Ambassador, as required by Sections 91 and 92 of the Religious Corporation Law.

The act of 1942 purporting to validate such deeds without the signature of the Ambassador in my opinion is invalid because that act says that such a transfer without the signature of the Ambassador is valid if the deed is "otherwise valid." And I submit that the deed is not "otherwise valid," and consequently this act of 1942 does not apply, does not save the deed. If it be held that this argument is unavailable, then I say the act of 1942 is be-
[fols. 146-155] yond the power of the Legislature because it purports to affect vested property rights which had vested in 1925 when the trust was diverted and the Legislature in 1942 cannot validate a breach of trust committed in 1925.

Fifth, the plaintiff has shown no order of the Supreme Court, permitting the transfer by the corporation to plaintiff. It may be urged that such order is required under the Religious Corporations Law, where a corporation transfers religious property. If it be urged that the Act of 1925, incorporating the plaintiff, authorizes the corporation to convey to the plaintiff, I say that that Act must be construed to mean that the corporation may convey to the plaintiff if it otherwise complies with the law, namely, obtaining a permissive order of the Supreme Court.

Finally, if the Act of 1925 be construed in a contrary sense, then I say it is beyond the power of the Legislature to provide by general statute that all religious corporations must convey by permissive order of the court and then pass a special act saying that this particular corporation need not obtain such permissive order.

[fol. 156] (The minutes referred to were received in evidence and marked Plaintiff's Exhibit 14).

Mr. Kilroe: Now, if the Court pleases, I ask your Honor to take judicial notice of chapter 693 of the Laws of 1945, which is an act to amend the Religious Corporation Law in relation to the Russian Orthodox Greek Catholic Church of North America.

Mr. Adler: That is Article 5-C.

[fol. 157] The Court: Let us mark it in evidence with the understanding that while it is marked in evidence for the purposes of this trial, in the event of an appeal it need not be incorporated as part of the case on appeal, because, of course, I may take judicial notice of all of the statutes, but for our mutual——

Mr. Adler: It is all in.

The Court: I know, but for our mutual convenience it is better to mark them physically in evidence because we can refer to them more readily. So that will be received in evidence.

(Received in evidence and marked Plaintiff's Exhibit 15.)

Mr. Kilroe: If the Court pleases, there are three Sobors mentioned in this Act. One of the Sobors is already in evidence.

The Court: You mean the minutes of them?

Mr. Kilroe: The minutes of the Sobor. So I now offer in evidence the minutes of the 1934 Sobor and the 1937 Sobor.

Mr. Adler: What are you offering in evidence?

Mr. Kilroe: The minutes of the 1934 Sobor and the 1937 Sobor.

Mr. Arkush: The 1934 Sobor was the Sobor at which Metropolitan Theophilus was elected, which reaffirmed the autonomy of the American Church, and the 1937 Sobor was the Sobor at which the constitution, such as it is, of the American Church, was adopted, and which again re-[fol. 158] affirmed the autonomy of the Church, and also approved the temporary Statutes for the Russian Church Abroad, which Mr. Adler asked me to produce.

Mr. Adler: Are they in English?

Mr. Arkush: All in English.

Mr. Adler: I assume they are a lot of self-serving declarations, and I object to the production of these on the ground they are self-serving and immaterial. I am willing, however, to stipulate that certain actions were taken at these Sobors, which I think is all that is necessary for the purpose of this case.

Mr. Arkush: It may be, your Honor.

(Discussion ensued off the record between the Court and counsel.)

Mr. Arkush: It is stipulated for the purposes of this action that at the All-American——

Mr. Adler: Not All-American, at the Sobor of this group of Churches.

Mr. Arkush: Well, you can say this group of Churches.

Mr. Adler: Or the self-styled All-American.

The Court: Just identify it. It is not accepted as being binding on the defendants. Just accept it as terminology. Go ahead.

Mr. Arkush: At the Sobor of Russian Orthodox Greek Catholic Church of North America, held in Cleveland in 1934, Bishop Theophilus of Chicago was elected Metropolitan and Ruling Bishop of such Church.

[fol. 159] Mr. Adler: Of the District.

Mr. Arkush: Of the District.

Mr. Adler: To succeed Archbishop Platon Rojdesvensky.

Mr. Arkush: That is right.

Mr. Adler: The latter being the man who was the defeated defendant in the Kedrovsky case.

Mr. Arkush: Oh, well——

Mr. Adler: Let us identify him.

Mr. Arkush: That also at said Sobor, certain statutes for the administration parishes, known as the Normal Parish Statutes, were adopted.

That at a Sobor of said Church held at New York in 1937, certain temporary Statutes for the administration of the Russion Church Abroad were adopted, certain Statutes for the administration of the Russian Orthodox Greek Catholic Church of North America were adopted, and that at both said Sobors, 1934 and 1937, the temporary autonomy of said American Church, which had been authorized in 1924, was reaffirmed.

Mr. Adler: I will stipulate that the foregoing actions took place, but object to their value or materiality or relevancy to this case; in other words, that testimony to that effect would be offered.

Mr. Arkush: I think we ought to get the exact dates of the Sobors to tie them up with the statute.

It is further stipulated that the Sobor at Cleveland was

held on or about or between November 20th and 23rd, 1934, [fol. 160] and the Sobor at New York was held on or about or between October 5th and 8th, 1937.

Mr. Adler: Will you further stipulate that all the matter that you have referred to, the actions and resolutions of these two Sobors, do not relate in any way to Saint Nicholas Cathedral?

Mr. Arkush: I don't think so.

Mr. Adler: They didn't refer to it, did they?

Mr. Arkush: I don't know. There probably were some references to it.

Mr. Adler: All right. May I just clear up one further misunderstanding which I believe crept into the record?

The plaintiff offered in evidence a proposed order of 1926, June, 1926, submitted to Mr. Justice Mullan, and it was offered, I believe, in support of their plea that an injunction tolled the statute. After awhile, I withdrew my objection to this order and joined in its offer in evidence. On examination of this proposed paper, I find that it is nothing but a proposed order, not signed by the Judge. It is not an order at all. It is not an injunction at all. Consequently, in the nature of the case it couldn't toll the statute one way or the other. So I withdrew my consent to the introduction of that paper, which consent was given under a misapprehension.

The Court: The statement was made that it was signed.

Mr. Adler: That is what I thought, but here it is.

[fol. 161] The Court: I saw that it wasn't signed. I thought there was another original in the file somewhere.

Mr. Kilroe: We have a copy of the Clerk's minutes, your Honor, which are already in evidence, I believe.

Mr. Adler: That doesn't show what order, or what was——

Mr. Kilroe: Well, we have the whole file. You can examine it. There is only one order.

The Court: Have you a signed order there?

Mr. Adler: They haven't.

Mr. Kilroe: That is all there is in the case but the minutes show, your Honor, the Clerk's minutes——

The Court: He may have signed a different order which is missing from the files. Very often both sides submit an order. Who submitted that proposed order?

Mr. Adler: The defendants in that case, the plaintiff in this case.

The Court: That looks to me as though it were a counter-order. Who procured the injunction?

Mr. Adler: Kedrovsky did.

The Court: Kedrovsky being what?

Mr. Adler: The plaintiff in the other action.

Mr. Kilroe: That is right.

Mr. Adler: After Kedrovsky was declared to be the Archbishop he apparently brought an action against the present plaintiff seeking to enjoin it from interfering with his possession. What happened thereafter I don't know.

[fol. 162] The Court: Let me see that.

(Paper handed to the Court.)

The Court: This is probably a counter-order that was never signed, Mr. Arkush.

Mr. Arkush: Here is a bond——

The Court: I know, but evidently this is what happened: The plaintiff made this motion for a temporary injunction. Ordinarily the plaintiff's order, upon the granting of that motion, would be signed. This is an order submitted by the defendant on notice to the plaintiff, and this is evidently the order that was not signed. It may not very substantially from the order which was signed.

Mr. Arkush: Yes. Here is the order settling it. These papers are in bad shape, your Honor. They are badly mixed up.

The Court: Evidently there was an order, an injunctive order signed.

Mr. Kilroe: Yes. There was an undertaking furnished by the plaintiff.

Mr. Adler: Maybe it was an ex parte order. We don't know what ultimately happened.

The Court: Evidently there was a settled order signed, because we have here a memorandum on the settlement of the order, but it was the plaintiff's order which was signed and not the defendants'.

Mr. Arkush: I think the injunction against Platon was sufficient for your Honor to hold that the corporate entity would have been disregarded.

The Court: Reading this plaintiff's memorandum in con-

[fol. 163] junction with the unsigned order, it is quite evident that an order was signed enjoining——

Mr. Arkush: They certainly could have gotten an order.

The Court (Continuing) —enjoining the defendant. Why don't you go back to the Law Journal in the library and get the memorandum?

Mr. Kilroe: We will do that, your Honor.

Mr. Arkush: Before the end of the case.

Mr. Adler: As matters stand, your Honor is inclined to receive that unsigned order as some evidence of the existence of some injunction?

The Court: Isn't that in evidence now?

Mr. Adler: Yes.

The Court: I will strike it from the record.

Mr. Adler: Which one is that?

The Court: The unsigned order.

George P. Fedotov, recalled, testified further as follows:

Direct examination.

By Mr. Arkush:

Q. After the Sobor of the so-called Renovated Church held in Moscow in 1923 did the Government permit the Patriarchal Church to set up a Central Church Administration?

A. No.

Q. How long a time elapsed before such permission was granted?

A. About four years, until Sergius, locum tenens, concluded the agreement with the Soviet Government in 1927.

[fol. 164] Q. What was that agreement, in substance?

A. That the Church receive the Central Government, call a Synod, and acknowledge the loyalty towards the Government, has given up, or given pledge to give up all anti-Soviet politics and be loyal to the State.

Q. And in accordance with that agreement did Sergius issue an encyclical to all the Russian Orthodox clergy abroad?

A. Yes.

Q. What was the substance of that?
A. He required——

Mr. Adler: First, the date.

The Witness: The date? Oh, 1927, but I don't know exactly. I don't remember exactly.

By Mr. Arkush:

Q. In 1927?
A. Yes.

Mr. Adler: If he is giving the contents of a written document I would like to have the written document produced first, because this witness is just free to say anything then.

Mr. Arkush: I think it is in your possession, Mr. Adler, because it is one of the basic papers of the Patriarchal Church.

Mr. Adler: I have never seen it.

By Mr. Arkush:

Q. Well, is it a historical fact accepted by all writers on Russian Church history that the acting locum tenens, Metropolitan Sergius, demanded from all the Russian clergy abroad a written certificate of their loyalty to the Soviet Government?

A. Quite. Everybody knows.

[fol. 165] Mr. Adler: Just a moment——

Q. Don't answer yet.

Mr. Adler: I object to the question as calling for a conclusion, referring to a written document that is not in evidence.

The Court: Have you no written document?

Mr. Arkush: No, we don't have the text of it, but there is unanimous agreement on the fact by all writers——

Mr. Adler: I must dissent. I searched, in the preparation of this case, for every relevant document and I must say that nobody, until this minute, has ever mentioned to me the existence of any document of October, 1927.

Mr. Arkush: Well, we can prove it through your own witnesses.

Mr. Adler: Fine.

By Mr. Arkush:

Q. As a result of the persecution of the Russian Orthodox clergy were many bishops transported to Siberia?

Mr. Adler: I object to the form of the question as calling for a conclusion, something not within the knowledge of the witness. He says he left Russia in 1923.

Mr. Arkush: 1925.

Mr. Adler: Or 1925, whenever it was.

The Court: Sustained.

Q. As a result of your historical research into the history of the Russian Orthodox Church what is your best [fol. 166] estimate of the number of bishops who were arrested and sent to Siberia during the period 1917, say, to 1929?

Mr. Adler: I object to that.

The Court: Sustained.

A. Siberia was——

Q. No, don't answer.

A. May I answer or not?

Q. You are not permitted to answer. During the period 1923-1927, what was the attitude of the Russian Government toward the Patriarchal clergy as compared with the Renovated clergy?

[fol. 167] By Mr. Arkush:

Q. What was "Bezbojnik"?

A. That in English means "Godless, atheist". It is the title of a magazine and also of a daily newspaper dedicated to propaganda of atheism.

Q. Propaganda of atheism?

A. Yes.

(Colloquy)

Q. Now I am going to show you, Professor Fedotov, the Ukase of 1920, which is already in evidence, in both Russian and English. The Russian text is in the possession of some other people and I see they didn't come to court today. I call your attention to Exhibit 5-A, and particularly the words, "The circumstances of a Diocese finding itself cut off from the Church Government for any reason

or in the event of the interruption of the action of the Church Government," and also the words, "Should a Diocese be cut off from all communication with the Church Administration in consequence of military movements or by reason of the changing of boundaries of States, or should both the Church Administration and the Most Holy Patriarch be prevented from exercising their functions," and I ask you whether in your opinion substantially that state of facts existed with regard to the Diocese of North America and Alaska and the administration of the Russian Orthodox Church, referring to the Patriarchal Church?

[fol. 168] Mr. Adler: Just a minute. I object to that question.

Q. In the years 1923 to 1927?

Mr. Adler: I object to that question, your Honor. It is calling for a conclusion. It is incompetent, immaterial.

The Court: What state of facts do you mean, that this association of the various Diocese with the Mother Church——

Mr. Adler: No, the whole course of history——

Mr. Arkush: No. What happened, your Honor, is this: As Professor Fedotov has testified, with the connivance, support and cooperation of the Communist Party and the Soviet Government and the secret police particularly, this schismatic movement took place, which practically extinguished for the time being the administration of the Patriarchal Church. Now, the Patriarchal Church is the only Church recognized by either of the parties to this suit as the canonical, true church in those years, and the Renovated Church which was set up at the Sobor of 1923 had what protection and favoritism and privileges there were, even those not being so great. So that we say, in effect, in those years 1923 to 1927 this Diocese, which looked only to the Patriarchal Church, was cut off from the central office and was therefore justified in operating under the Ukase of 1920 which has been issued by the Patriarch and his Synod.

What I am very fearful of is that your Honor will be [fol. 169] persuaded by Mr. Adler to look on the opinion of the Appellate Division in the Kedrovsky vs. Rojdesvensky case as accurately reflecting the state of facts. The

Appellate Division simply did not realize—it was too early then, the facts were too recent, and there was no way of showing them—the Appellate Division did not realize, except Mr. Justice Martin, that there were two bodies, the schismatic body and the canonical body, and they simply acted as if there were but one Church. We realize now with——

The Court: I have allowed you a great deal of leeway in proving that. I allowed it on Friday.

Mr. Arkush: I don't want to gild the lily and, if we have proven it, I will stop there.

The Court: Because there, there was something in evidence which would allow a qualified historian to, within proper bounds, render an expert opinion. There at least we had the decree.

Mr. Arkush: Then I will press that question, if not in that form, in some other form, because I do want his opinion as to whether the facts of which he had some personal knowledge, and also with which he has a great deal of knowledge as a historian come within substantially the language of that Ukase.

Mr. Adler: Your Honor, I want to point to paragraph 10 of this ukase, Plaintiff's Exhibit 5-A, just a few words. It says this:

"All such measures (referred to in the ukase) as may be taken in conformity with the present decision must [fol. 170] upon the re-establishment of the Central Highest Church Authority be submitted to same for confirmation," which they never did.

Mr. Arkush: Yes, we did.

Mr. Adler: Excuse me, this witness has testified that this was just a temporary——

The Court: Reframe your question and let us get on.

By Mr. Arkush:

Q. Having in view the conditions in effect from 1922 to 1927, would you say that the Diocese of North America and Alaska was cut off from communication with the administration of the Patriarchal Church in Russia?

Mr. Adler: I object to the question as calling for a conclusion. It is incompetent, immaterial and irrelevant and there has been no foundation laid for it.

The Court: I think that is an ultimate conclusion. I will sustain the objection.

Q. Did the Patriarchal Church in the years 1922 to 1927 have an effectively functioning central administration?

Mr. Adler: Your Honor, I object to that on the same ground. It is grossly conclusory. In the first place——

The Court: Let him describe how it functioned, if at all. We will draw the conclusions.

Q. How, if at all, did the Patriarchal Church function in Moscow in the years 1922-1927——

[fol. 171] Mr. Adler: He left Russia in 1925. I don't think he is in a position——

The Court: Objection overruled.

The Witness: May I answer, sir?

The Court: Yes.

A. The first year, from 1922 to 1923, the Patriarch was imprisoned and had no administration at all, of course. Being liberated for four years, he lived in confinement in a monastery without any official organs of central administration.

The Court: We have had all this.

A. (Continuing) And certainly was not free, or under repression in his correspondence abroad.

Q. All right. Then he died when?

A. In 1925.

Q. Go on. Then from 1925 to 1927?

A. Up to the year 1927 there existed no Patriarchal central administration.

Q. All right. That is enough.

[fols. 172-173] Mr. Arkush: I offer in evidence declaration of Metropolitan Sergius, June 10, 1927, as printed on pages 95 and 96 of "People, Church and State in Modern Russia," by Paul B. Anderson, a typewritten copy to be marked.

(Received in evidence; to be marked Plaintiff's Exhibit 15A.)

Mr. Arkush: Now I offer a statement by Stalin, printed in Mr. Anderson's book at pages 101 and 102.

[fol. 174] The Court: Ask him this, as a historian, did

that statement reflect the position of the Soviet Government in 1927, at the time it was made?

You have an exception. This is expert testimony.

The Witness: Yes.

(Received in evidence, to be marked Plaintiff's Exhibit 15B.)

Cross examination.

By Mr. Adler:

Q. Professor, you left Russia in 1925, did you not?

A. Yes.

[fol. 175] Q. And by 1917 you had achieved a position of standing, had you, in Russian universities?

A. By the year 1917?

Q. 1917.

A. Yes.

Q. You were a Professor at a university in 1917?

A. I was Assistant Professor in Petrograd.

Q. How old were you in 1917?

A. 1917?

Q. Yes.

A. 33.

Q. And you had a position of influence and importance in Russia by 1917?

A. No, I cannot say this.

Q. Well, don't be modest.

A. No, not here.

Q. At 33 you were an Assistant Professor at a university, were you not?

A. If you like.

Q. And you had written about Church history, had you not, by that time?

A. No. My field, academic field, was the History of Middle Ages at that time.

Q. Very well. Whatever the subject was, you were an author by the time you were 33, weren't you?

A. Yes.

Q. And I take it that you find displeasure in the course of events in Russia following the year 1917, isn't that so?

A. Yes.

Q. The situation prior to 1917 was much more congenial to your ideas, was it not?

A. What do you mean by that, congenial to my ideas?

Q. Do you honestly entertain difficulty in understanding what I mean by that question?

A. Yes, I do.

Q. You do?

A. Yes.

The Court: He means personally you were happier under the regime before 1917.

The Witness: Oh, you mean before 1917?

[fol. 176] Q. Yes.

A. I was Socialist and Social Democrat for a time in my youth, and always in the opposition to the Czarist Government, so I felt not happy.

Q. You opposed the Czarist regime, is that it?

A. Yes.

Q. You are familiar, aren't you, with the condition of the Church in Russia under the Czarist regime?

A. Yes.

Q. Did you oppose or favor that position of the Church?

A. Opposed.

Q. Did you oppose it by any external act or just by internal conviction?

A. By conviction.

Q. But by no effort? You made no effort to express that opposition, did you?

A. I had no opportunity because I was not a public man and had no position even in the Church.

Q. Well, you will admit, will you not, that prior to 1917 the Russian Church was an arm of the Czarist Government?

A. Was what?

Q. Was an arm of the Czarist Government.

A. It is a very strong expression, but certainly the Church was not free in her social and political activity.

Q. The Church prior to 1917 was an aid and instrument of Czarist policy, was it not?

A. I repeat, it is too strong.

Q. You think my expression is a little too strong?

A. Yes.

Q. But watered down a little, it is substantially correct?

A. Yes, in politics, yes.

Q. And I assume from what you said that you will agree that the Czarist Government was an autocratic regime?

A. In law, but——

Q. Pragmatically, in practice. Will you deny that?

A. No. I don't wish to deny it, but there is a great dif-
[fol. 177] ference between the autocracy before 1905, the first Revolution, and after.

Q. Well, of course, but basically, broadly, the Russian Czarist Government was an autocratic regime, oppressive of the people, prior to 1917?

A. Now the term "autocracy" was the object of the discussion and arguments between the Government and Russian Parliament, so we considered that in law it was not autocratic any more. But of course it was oppressive, yes.

Q. I am not talking about law. I am talking about actual facts, actual experience. You lived in Russia and you observed facts, didn't you?

A. Yes.

Q. As a result of your observation, to be candid, wouldn't you have to admit that the Czarist Government was an oppressive regime of the people?

A. Yes, I admit.

Q. And that the Church participated in and helped the Czarist regime in that oppression?

A. Unfortunately in many cases it is true.

Q. All right. That is all I am trying to establish. Now, the Czarist Government had an official known as a Chief Procurator, who was the President of the Holy Synod which was technically the official Chief Ruling Body of the Russian Church, isn't that the fact?

A. Not quite correct. The Procurator was not the President. The President was always a Bishop, Metropolitan. But he was a ruling member, representative of the Government within the Church——

Q. So the civil power——

Mr. Arkush: Let him finish. He didn't finish.

Q. Hadn't you finished?

A. I think so.

[fol. 178] Q. Have I interrupted you?

A. You have interrupted me, but I have finished my sentence.

Q. You finished your thought. Well, if you want to amplify that remark——

A. In law, the Procurator was the representative of the State within the Synod and the defender of State's rights within the Church, but in fact he was as representative of the Czar within the Synod. He was a great power and influence upon the decision of this——

Q. Precisely, and the Supreme Church Authority in Russia was subordinate to the power and direction of the Chief Procurator as representative of the Czar, is that right?

A. Yes.

Q. So that to that extent the Russian Church was subordinate to and an instrument of the civil Czarist power? That is substantially correct, is it not?

A. Instrument in a political sense, because, you know, the Church has other fields of activity outside politics and social problems, in education, in missions, and so on.

Q. Well, who appointed the Archbishops of the Foreign Missions?

A. The Czar.

Q. The Czar did not permit the convening of Sobors, did he?

A. He procrastinated for twelve years. The Sobor was expected by the Church and promised by the Government.

Q. But never accomplished?

A. Yes.

Q. And the procrastination lasted from the time of Peter the Great to 1917, didn't it?

A. Yes, since Peter the Great, or before, we had no Sobors.

Q. So that throughout the entire Czarist period from Peter the Great until 1917 there were no Sobors?

A. Yes, it is true.

Q. After the Bolshevik Revolution, was it not among the first principles announced that there was a separation of [fol. 179] Church and State?

A. Yes, it was an edict published in January, 1918.

Q. And you regard that as a liberating change, don't you?

A. No, we must distinguish——

Q. Yes or no, first, then we will distinguish.

A. No.

Q. You don't regard that as a liberating change?

A. No.

Q. That is all.

A. That is all.

Q. Professor, I am interested in the system of ideas which you hold, because you criticised events, and I want to know the basis on which you criticised those events. You remained in Russia after the Revolution from 1917 to 1925. Where were you stationed during those years?

A. In Petrograd and after in Saratov.

Q. How long were you in Petrograd?

A. Three years in Petrograd.

Q. That is from 1917 to 1920 you were in Petrograd?

A. Yes.

Q. From 1917 to 1920 in Petrograd and——

A. Two years in Saratov and then——

Q. Where is Saratov?

A. On the Volga River.

Q. That is in the interior of Russia?

A. Interior.

Q. And after 1922 where were you?

A. I was in Petrograd again.

Q. You returned to Petrograd?

A. Yes.

Q. And you remained there until 1925?

A. Yes.

Q. Then you left in 1925?

A. Yes.

Q. Was your work as professor interrupted during the period that you were in Russia?

A. No.

Q. You were not personally molested, were you?

A. No.

Q. In 1925 did you leave by choice or under some form of compulsion?

A. By choice.

Q. And you were able to take your family with you?

A. Yes.

[fol. 180] Q. Now I take it as a professor and a scholar you believe that such a professor and scholar must, however controversial the issue, be fair, factual, honest, and not distort, give a false impression, or import propaganda? Do you believe in those principles of scholarship?

A. Yes.

Q. And I suppose you will say that you attempt to be guided by them?

A. Guided by?

Q. Guided by those principles?

A. Yes.

Q. In your writings?

A. I hope so.

Q. And in the testimony you gave in this court?

A. Particularly in the court.

Q. Well, do you make a distinction between testimony in court and writings?

A. I make, because——

Q. Wait a minute. Do you make a distinction?

A. Yes, I make.

Q. In other words, you say you are more truthful and accurate in court than you are in your writings?

A. I mean—No.

Q. You are embarrassed, aren't you?

A. Certainly I am embarrassed, because if I every time must be conscious and cautious in my activity, in my research, particularly after the oath, I am obliged to be mostly cautious.

Q. Does it make any difference to a genuine——

A. Yes.

Q. Excuse me. Does it make any difference to a genuine scholar whether he is under oath or not?

A. But for Christians——

Q. Answer me. Does it make any difference, yes or no?

A. No, because religious scholar has a particular duty to be true to his oath, because I have sworn upon the Bible here.

Q. Well, suppose a man doesn't swear upon the Bible, does that privilege him, if he is a professor, to be untrue?

A. Certainly not.

[fol. 181] Q. All right. Now, since you left Russia in

1925 you have expressed your displeasure at the course of events in Russia, both in writing and orally?

A. Yes.

Q. The course of history has displeased you, has it?

A. What?

Q. The course of history in Russia after 1917 has displeased you?

A. Of course, yes.

Q. And you understand that your testimony is being used as a foundation for the argument that, because of alleged conditions in Russia, the group of churches in the United States could declare themselves autonomous or independent? You understand that, don't you?

Mr. Arkush: Just a minute. There is no claim that we claim ourselves independent. Autonomous is the word.

Mr. Adler: All right, whatever word you want.

Q. You understand that, don't you?

A. There is a connection of course between my appreciation of the course of events and the approciation of the course of events in America.

Q. And the blacker you paint the picture in Russia, the more color there will be lent to this claim made by the plaintiff? You understand that, don't you?

A. I refuse to answer because your question presupposes that I am blackening consciously the facts. I try to be true to the facts.

Q. Well, the fact that the blacker the picture in Russia is painted, the more color there will be lent to the plaintiff's claim, is not absent from your mind, is it?

Mr. Arkush: He has answered, your Honor. He says he is trying to be truthful and resents the implication [fol. 182] that he has been coloring facts.

A. Your question implies my unloyalty or my bias, my tendency. I deny it.

Q. Precisely.

A. I deny it.

Q. You did not attend the Sobor of 1923 in Russia, did you?

A. No.

Q. You carried on your work as a professor and you remained substantially in the academic atmosphere, didn't you?

A. Yes.

Q. You didn't travel around the country making observations the way a reporter would, did you?

A. No. It was impossible in Russia at that time.

Q. Well, you didn't?

A. I didn't.

Q. So that your opportunities for observation were limited to the rather narrow circles in which you moved, is that not so?

A. Yes, but not only by the circle, but the absence of free press and free movement in Russia at the time.

Q. The absence of a free press prevented you from getting knowledge of what happened all over Russia, isn't that so?

A. Our knowledge in Russia was limited, of course.

Q. Precisely. And it is upon this limited means of observation that you have purported to paint the picture that you did yesterday?

A. Yes, limited, but it was sufficient, because I had so many friends——

Q. You say it is sufficient, don't you, Professor?

A. Yes, I say it.

Q. In your estimation it is sufficient?

A. In my estimation it is sufficient.

Q. I take it, Professor, that you are wholly impartial in this case?

A. You take it?

Q. I assume you are wholly impartial in this case?

A. You really estimate it?

[fol. 183] Q. I say, is it fair to assume that you are wholly impartial in this case? Just yes or no?

A. What is "impartial"? Objective to the truth, but I took the side in the struggle, I mean, by my conviction. I was anti-Bolshevik and a Church man——

Q. No, I am talking about this case, this action in the courts.

A. Oh, in the court?

Q. Right here, this present action. You are impartial between the plaintiff and the defendants, aren't you?

A. No, as a member of the Church of Theophilus, I wish a certain issue of the trial, of course.

Q. You say you are a member of the Church of Metropolitan Theophilus?

A. Yes, I am.

Q. How long have you been a member of that Church?

A. Since my arrival to America, in 1941.

Q. When did you arrive in America?

A. In 1941.

Q. And you are now teaching in a school supported by Metropolitan Theophilus's group, aren't you?

A. Yes, I am teaching in the Seminary——

Q. And you get paid for this work?

A. Oh, it is so insignificant, that it has no role, no part in my virtue.

Q. You attended the Sobor in 1946 of this group of Metropolitan Theophilus, did you not?

A. Yes, in Cleveland.

Q. So it is fair to say that since you came to this country you have been actively associated with the movement represented by Metropolitan Theophilus?

A. It is true, preserving certainly my freedom of opinion, not following blindly my Metropolitan. We are free in our Church, but certainly I belong to his organization.

[fol. 184] Q. You referred to certain actions occurring from 1917 to 1925 in Russia, and although I don't recall your precise words, the impression I gathered was that the Sobor in 1923 particularly was convened by a revolutionary group, by violence or fraud, and through the instrument of the Government. In substance, that is the impression you sought to convey?

A. In substance it is true. You did not allow me to give you the whole picture.

Q. I understand.

A. But in substance that is it.

The Court: This is our legal procedure, Professor: If there is anything explanatory required or if you wish to amplify anything to make more complete a statement you may do so through Mr. Arkush who will question you, and you can explain anything that is left unexplained.

The Witness: If you allow me to give you the full answer about the Sobor of 1923 I can.

By Mr. Adler:

Q. Now, wait a minute. I asked you whether my summary of your statement was substantially correct. Either it is or it isn't.

A. Yes, it was violent, it was a sense of convictions of some members of this gathering, of this Sobor. I don't deny it.

Q. Did you yourself see any acts of violence in connection with that Sobor?

A. Yes, because——

Q. What acts? How many acts?

A. What?

Q. How many acts of violence did you see?

A. It is impossible to answer how many acts because——

[fol. 185] Q. Was it two or one?

A. Thousands, because throughout Russia they arrested thousands of priests and bishops, in order to give the government to this revolutionary group. That is the answer.

Q. I asked you what you saw and you told me what you heard?

A. I——

Q. Excuse me. Isn't that the fact? You didn't see thousands of arrests, did you?

A. I——

Q. Yes or no, did you see?

A. Nobody could see but——

Q. Precisely. That is right.

A. But I heard and I read.

Q. I say——

A. I read in newspapers, in Soviet newspapers at that time about these trials.

Q. Notwithstanding the lack of freedom of the press, you say you read these things in the press?

A. In the cases when the Government wishes to publish some facts, of course it is published. It was——

Q. All right. You also said that the attitude of the Soviet Government in those years, 1920, 1921, 1922, 1923, and so on, was anti-religious and atheistic, I think you said that in substance, did you?

A. The Government?

Q. Yes.

A. Yes, of course.

Q. In the course of your searches as a student of Church history you have observed that that is not an isolated phenomenon in any revolution, is it, yes or no?

A. There were some religious revolutions too, in England, for instance.

Q. But anti-religious feeling and even atheistic feeling, expressions and actions were a frequent concomitant of a social revolution, haven't you found that so?

A. There was only one social revolution in the world.

[fol. 186] Q. That was the French Revolution?

A. No, Socialist Russia.

The Court: He didn't say Socialist. He said social.

A. Of course, French Revolution, social or what, was not atheistic, but anti-Catholic.

Q. You say the French Revolution did not have a period when it was atheistic?

A. No, no period.

Q. You have answered it. You have said no.

Mr. Arkush: I am not objecting, but it seems to me this is going pretty far afield.

Mr. Adler: Wait a minute.

Q. Don't you recall that the Assembly, the National Assembly in France, shortly after the French Revolution, passed a resolution purporting to abolish God, and that that resolution failed of carrying by one vote? Do you recall that incident?

A. But it failed.

Q. But the resolution was proposed, wasn't it?

A. Officially, atheism was prohibited and punished by death by Robespierre. Robespierre punished the atheists.

Q. I know, but wasn't there a period——

A. And various other people.

Q. (Continuing)—in the French Revolution when they were atheistic?

A. Never was.

Q. Well, now, coming to the Sobor of 1923, have you read the minutes of that Sobor, by the way?

A. 1923?

Q. Yes.

A. Not the minutes but the resolutions.

Q. The resolutions?

A. Yes.

Q. The minutes and resolutions of that Sobor are in evidence. They were offered by Mr. Arkush. You recall, [fol. 187] do you not, that there were about 600 delegates at that Sobor?

A. I don't remember exactly.

Q. Well, the record will show that. There were about 600 delegates.

A. I don't deny it.

Q. And that the minutes of that Sobor were signed by 62 Bishops—do you know that?

A. Yes, by many Bishops.

Q. And that representatives of the American Methodist Church were present at that Sobor?

A. I think so.

Q. And that Bishop Blake addressed that Sobor?

A. (Nodding yes.)

Q. And that a Methodist minister by the name of Hartman was present?

A. Who?

Q. Reverend Hartman was present as a delegate of the Methodist Church at that Sobor?

A. I don't remember. It is possible.

Q. Do you know that Reverend Hartman testified in the course of the case of Kedrovsky vs. Rojdesvensky as to the convening of that Sobor, as to the meetings that were held, the proceedings of the meetings, and the resolutions that were passed? Do you know that?

A. I don't know.

Q. Do you know that Reverend Hartman testified that there was no violence in connection with the calling of that Sobor, that there was no duress, and that the Sobor was called peacefully and the delegates were elected fairly?

A. I don't know that.

Q. You don't know?

Mr. Adler: Now I offer in evidence the testimony of Reverend Hartman which appears at pages 106 to 137

of the record on appeal in Kedrovsky against Rojdesvensky.

Mr. Arkush: I object to that, your Honor.

The Court: Sustained.

[fol. 188] Q. Did you know that a witness by the name of Mr. Hibben testified in substance to the same effect concerning the meeting of that Sobor?

A. Mr. Hibben?

Q. Mr. Hibben (spelling) H-i-b-b-e-n.

A. I did not hear that.

Q. That Sobor of 1923 passed a number of resolutions, did it not?

A. Yes, of course.

Q. Among those resolutions was the principle that the Church and State be separated, was it not?

A. Yes.

Q. Another resolution was that delegates to the convention be limited to speeches of 15 minutes, do you recall that?

A. Maybe. No, I don't remember.

Q. Another was the relics of the Church should be preserved?

A. Yes, sir.

Q. Another was that monasteries be closed?

A. Yes.

Q. Now, isn't it a fact that in other countries monasteries had been closed hundreds of years ago?

A. Not in all of course. In some.

Q. Well, not all. Do you recall the situation in England when Henry VIII closed the monasteries and took over many churches?

A. Yes, I know it.

Q. That was a familiar phenomenon all over the continent hundreds of years before 1923, isn't that so?

A. There were countries who abolished monasticism. There were Protestant countries but in Catholic countries still exists.

Q. Are you sure of that statement?

A. Of course——

Q. Well, in France?

A. In France, yes.

Q. So you want to withdraw that.

A. Yes, but you know that in the last generation the mon-
[fol. 189] asteries were readmitted in France. In fact, there were hundreds of them.

Q. In any event, the closing or opening of monasteries was a legitimate subject of debate and difference of opinion in a Church, isn't that so?

A. The fact that during revolutions monasteries are usually closed don't make this fact legitimate.

Q. No, I say that a resolution to close monasteries is not anti-canonical or revolutionary.

A. Certainly it is Protestant and not Orthodox.

Q. But couldn't a resolution to close monasteries be passed in a conservative Sobor called in accordance with all the requirements of the Orthodox Church?

A. No, I don't think so. Monastic institute is a core of the Orthodox life, the essence.

Q. There were many groups in the Sobor of 1923 representing various elements in the Church?

A. They were very close to another, three Reformed Churches, but not conservative party in the Church.

Q. All right. Prior to 1917, these various reform movements in the Church found no means of expression because there were no Sobors, that is a fact, isn't it?

A. No, they had the means of expression.

Q. What was the means of expression?

A. By press—they published books and magazines.

Q. But after the revolution, in this Sobor, these various reform movements were able to find a forum in the Church, in a Church meeting to express their views, isn't that so?

A. They participated in the first Sobor of the Patriarch, who elected the Patriarch, in 1917. They were in the minority there.

Q. After the Sobor of 1923 didn't many of the parties who were present at that Sobor disappear, like so many
[fol. 190] ephemeral movements in the Church?

A. They were fused into one Synodal Church.

Q. But I mean after the fusing of the Synodal Church, after 1923, and by 1925 didn't all or most of the constituent members of that Sobor dissolve as parties and weren't they absorbed by the Patriarchal Church?

A. Isn't that the fact?

A. Not before the war. They existed separately.

Q. But to what extent did they exist separately?

A. As minority.

Q. Weren't there isolated communities here and there?

A. We have numbers, of course, approximate numbers, that they constituted a third of the parishes.

Q. Well, you haven't produced the data on which that is based, have you?

A. I don't remember.

Q. All right. Now you mentioned something about the persecution of the clergy in Russia during the period you were there from 1918 to 1925. Isn't it a fact that the clergy occupied a privileged position under the Czarist regime?

A. No, it is not very easy to answer your question.

Q. But to some extent?

A. It was very poor, the clergy.

Q. I am talking about the hierarchy, the bishops.

A. The bishops, but not the priests.

Q. The bishops were in a privileged position under the Czarish regime?

A. Yes.

Q. And naturally they had a stake in the preservation of the Czarish regime, didn't they?

A. Not only on material grounds, but on convictions. They were for autocracy.

Q. Whatever the grounds, they had a stake in the perpetuation of the Czarist system, of which they were the bishops?

A. According to their convictions, yes.

[fol. 191] Q. When the Revolution came in 1917, the privileges of these clergymen were suddenly taken away, isn't that so?

A. Yes, but not only this. Of this——

Q. Wait a moment. That is true, their privileges were suddenly taken away?

A. Yes.

Q. And isn't it the fact that for this and perhaps other reasons too a number of clergymen took the side contrary to the Revolution? Isn't that the fact?

A. I don't deny that some of them took part in the counter-Revolution movement.

Q. All right. They fought against the Revolution and joined the Czarist forces.

A. It was a minority, a dwindling minority.

Q. You say dwindling. Upon what authority do do state your position that it was dwindling?

A. Because living in Russia in two cities I saw that most of the clergy remained on their places, not went with the armies to the White Armies, to the South.

Q. Isn't it a fact that Patriarch Tikhon issued an anathema against the Revolution?

A. Yes.

Q. And a great many clergymen followed his directions, didn't they?

A. I think nobody followed him, because this anathema was expressed in such a vague sense that it would be impossible to effectuate it.

Q. It was a sufficient hint for a great number, wasn't it?

(No answer)

Q. You understood what it meant, didn't you, when you saw it?

A. It was not a call to arms for counter-Revolutionary actions.

Q. Well, the point of fact is, isn't it, that a number of the clergymen were in the opposite camp of the Revolution?

A. Yes, a number of the clergymen.

[fol. 192] Q. And a number of these were executed or punished or otherwise put under restraint, isn't that so?

A. But not those who took part in the counter-Revolution, because they were outside the Soviet territory.

Q. Isn't it a fact that those priests and bishops who were punished, were punished not because they were priests but because they were actively engaged in arms against the Revolution?

A. I deny this.

Q. You deny this?

A. Yes.

Q. But you know there is a contrary opinion, don't you?

A. Yes, opinion, yes, exists.

Q. Well, you have an opinion too. Do you set up your opinion as infallible?

A. I——

Q. Excuse me, do you?

A. What?

Q. Do you set up your opinion as infallible?

A. No, of course not.

Q. You admit that others with legitimate grounds may have a contrary opinion to that?

A. Not all opinions have the same grounds.

Q. That's right. Would you accept the opinion of the Patriarch of Moscow?

A. No. He is not free in expressing his own opinion.

Mr. Adler: I move to strike that out. I asked if he accepted the opinion, and he said no, and that is the answer.

The Court: Strike out everything after "no".

Q. Have you seen the book called, "The Truth About Religion in Russia," compiled by the Moscow Patriarchate?

A. Yes.

Q. This book is accepted as an official publication of the official Moscow Patriarchate, isn't it?

A. Yes.

[fol. 193] Q. I take it you disagree violently with the statements made in there?

A. Yes, I disagree. It is untruth.

Q. You say the Patriarch of Moscow published untruths, is that it?

A. Unfortunately——

Q. This is a free country. You can entertain any ideas you want. Don't hesitate.

A. It is against my feeling, but I must.

Q. Truth compels you to make that statement, isn't that right?

A. Yes.

Q. I ask you whether you agree with this statement which appears on page 7, just a short paragraph—by the way, this is a statement by the Patriarch of Moscow: "We dare to say this, in spite of all the imperfection of our administration. Our Russian Church has not been led astray and destroyed by the whirlwind of events. It has kept unsullied its canonical consciousness and at the same time its correct and canonical supreme direction—that is, its part in the life of grace of the Ecumenical Church and its right place in the harmony of the Orthodox Autoce-

phalous Churches." You accept that statement as correct?

A. I accept. I agree with this.

Q. You agree with that statement. There are statements in the book which you say you have read to the effect that any priests who may have been executed or punished were so dealt with not because they were priests but because they were actively engaged in fighting the Civil War. Do you agree with that statement?

A. No.

Q. You do not?

A. I am sorry. I didn't understand the beginning. Some of the priests were executed for the counter-Revolution activity. I agree with that. But the majority not.

Q. All right. Who was executed as a defeated partisan in a Civil War and who was executed as a priest in a [fol. 194] matter which really cannot be determined, isn't that so?

A. Unfortunately, yes, it is difficult.

Q. And an ignorant man's opinion on that point is as good as your learned opinion, isn't that so?

A. But——

Q. Yes or no?

A. When I know or I knew some persons in Russia who died, not for counter-Revolutionary activities, but for loyalty to Church, I must witness. Patriarch Benjamin, the first name, which is considered as a Saint by most of the Russians now, who was the victim of this public trial because of this church valuables, he wishes to extradite these valuables. He went as much as he could for the Government, but in spite of this he was indicted and executed.

Q. You know of that one instance?

A. Yes, I was present at his trial. That is why I mention it. Did I say Patriarch? It is Metropolitan Benjamin.

Q. The Bolshevik Revolution removed any privileges that the clergy had under the Czar?

A. But it is not Bolshevist Revolution. You forget that we had before Bolshevik Revolution, a democratic Revolution.

Q. Yes, the Kerensky Revolution.

A. Yes.

Q. That removed the privileges of the clergy too, didn't it?

A. It began the reform of the clergy.

Q. And the Bolsheviks carried on that reform?

A. No, carried in the opposite sense, because the separation, so-called, in paper, in letters, was in fact a robbing of the Church and depriving of all activities of the Church.

Q. All right. Now when you say that clergymen were persecuted, don't you mean in effect that the withdrawal [fol. 195] of the privileges that they had under the Czar is the persecution you refer to?

A. No.

Q. All right. But you realize, of course, that this book "The Truth About Religion in Russia," makes those assertions, do you not?

A. Yes.

Q. And you agree, too, that this book asserts that the Patriarchal Church in Russia is free from restraint by the Soviet Government?

A. No, it is not free.

Q. I know, but does that book say so?

A. Yes, it says.

Q. And that the Church is at liberty to carry on its work without molestation by the Soviet authorities?

A. The book says.

Q. That is precisely it. And there are other books that say the same thing, aren't there?

A. Very few. In Russia only published three books of this country.

Q. Now, in point of fact, throughout the period that you were in Russia from 1917 to 1925 churches were open for religious worship, weren't they?

A. What period?

Q. 1917 to 1925?

A. Yes, they were, but many of them, more than half, were closed at the beginning of the Revolution.

Q. And they were later reopened, weren't they?

A. No. The number diminished from year to year. Before the Great War, before the last war, it was only one-tenth about of the former number.

Q. And because of the famine in Russia during the Civil

War, the churches were asked to contribute some of their precious valuables, like gold and so on?

A. Yes, it was an official pretext.

Q. You say they confiscated it instead of requesting it?

A. It was confiscated because when Patriarch proposed [fol. 196] to give up willingly they passed by this offer.

Q. In other words, they took what the Patriarch was willing to give willingly, is that it?

A. Yes.

Q. In other words, their manners were bad?

A. Even more than Patriarch because among these valuables there were sacred objects which the believers of the Patriarch preferred to pay for, to redeem for money, but they were not allowed.

Q. All right. Then throughout the period that you were in Russia services were held in the church?

A. Yes.

Q. Church meetings were held?

A. What is church meetings?

Q. Weren't there preachers on the corner, religious preachers on corners?

A. No.

Q. You didn't see that?

A. No.

Q. Looking at the situation after 1925, after you left, naturally, your information from that point on is based on hearsay, that is not from personal knowledge, but from study?

A. It is not identical, not hearsay and press, the press, some publication, Soviet publications.

Q. That is right, from study, not personal observation.

A. Yes, right.

Q. Are you familiar with the course of events in Russia in relation to the Church following 1925? You profess to familiarity——

A. Yes, because I wrote a book.

Q. Isn't it a fact that following 1925 up to the present time the following reforms were instituted in Russia: 1, religious schools were opened—yes or no?

A. I cannot answer yes or no, because they were opened only during the Great War. Before it was only for the Renovated Church.

[fol. 197] Q. All right. But recently religious schools were opened?

A. Of course there was a great change during the war, yes.

Q. And theological seminaries were established?

A. Now, yes.

Q. And religious churches are permitted to publish Bibles and religious tracts and circulate them and so on, isn't that so?

A. No. We must distinguish. No religious tracts as far as I know were distributed in Russia, but, perhaps, about Bibles, I don't know. I heard it, but we had no one copy of the newly printed Bible here.

Q. Isn't it a fact that the propaganda against religion was officially forbidden?

A. Yes.

Q. And that many churches which had been turned into museums have now been restored to their status as churches?

A. Some of them, yes.

Q. And isn't it a fact that the Constitution of 1936 removed any disabilities, civil or otherwise, of the clergy that had heretofore been imposed upon them?

A. It is true, but the Constitution was never realized, never was effectuated. It was never brought into practice.

Q. Isn't it true that the position of the Soviet authorities with respect to the Church is that the Orthodox Church is now subject to the state, has no preferred position, but has the same standing as all Churches within the territory of Russia?

A. Officially, yes.

Q. All right. Isn't it a fact that during 1942, while the curfew was on in Moscow, that midnight services were held at Easter and the curfew was lifted despite the war? Do you know that to be a fact?

A. Yes, but it was all the time, even before the war, the churches were open for worship. But very few——

[fol. 198] Q. Isn't it a fact that in 1945 a decree was passed restoring one-half of the property of the churches which was taken away from them during the early period of the Revolution?

A. What time?

Q. 1945.

A. I don't know about this decree.

Q. You don't know about this decree?

A. No.

Q. And that the ancient shrines were restored to the Church by that same decree?

A. I think partially, yes, they were restored.

Q. After 1925 the Patriarchal Church re-established itself, did it not, you say by 1927? You say the Patriarchal Church re-established itself by 1927?

A. Her central administration. The Patriarch was not elected.

Q. Well, all right. There the Holy Synod continued to function?

A. Yes.

Q. And after Patriarch Tikhon died in 1925, Metropolitan Peter was appointed in his place as locum tenens, isn't that so?

A. Two other people before Peter, but after, Peter.

Q. Within a year later, Metropolitan Sergius was appointed locum tenens?

A. Not locum tenens but substitute for locum tenens, because Peter in exile in Siberia had this title——

Q. So he was acting locum tenens.

A. Acting locum tenens.

Q. And Sergius continued to act as acting locum tenens until 1943, did he not?

A. Yes.

Q. In 1943 a Sobor was held in Russia which elected Sergius as Patriarch, did it not?

A. Not quite exactly, because this Sobor consisted only of some ten Bishops. It was not a true Sobor.

Q. It wasn't a universal Sobor, that is to say, representative from all the branches of the Russian Church all over the world, but it was a Sobor of the Bishops of [fol. 199] Russia?

A. Of a few of the Bishops, yes.

Q. And in 1945, another Sobor was held in Russia?

A. Yes.

Q. That was a universal Sobor, was it not?

A. Yes, I recognize it was.

Q. Representatives from all branches of the Russian

Church were invited to attend that Sobor, isn't that so?

A. Not all branches, but all localities.

Q. Localities. And present at that Sobor were the Patriarchs of other Eastern Churches, like the Patriach of Jersusalem, Patriarch of Alexandria, and so on?

A. Yes.

Q. And that Sobor elected the present Patriarch, Alexi, as Patriarch?

A. Yes.

Q. And he is acting as Patriarch today?

A. Yes.

Q. And all the other Eastern Churches which constitute the entire family of the Orthodox Churches recognize and have been in canonical communion with the Patriarch of Moscow as the head of the Russian Orthodox Church—that is true, is it not?

A. I cannot answer for all the Russian Orthodox Churches, but probably most of them.

Q. Do you know of anyone who does not?

A. My knowledge about the Eastern Church is now limited. I don't know about the Patriarch of Constantinople, for instance. Maybe, yes.

Q. All right. The Soviet Government then permitted the Sobor of 1945, did it not?

A. Yes, of course.

Q. That is something the Czars never did, isn't it?

A. What?

Q. That is something the Czars never permitted, did they?

A. Yes—in fact, yes, there were no Sobors, but Kerensky permitted, yes.

[fol. 200] Q. That is right. It took the Revolution to permit the holding of Sobors in Russia, didn't it?

A. Not Bolshevik Revolution.

Q. First Kerensky and then Bolsheviks carried it out?

A. No, democratic and then fascist Revolution. It is quite different things.

Q. I call your attention to Plaintiff's Exhibit 5-A, the decree of November, 1920 by Patriarch Tikhon.

A. November?

Q. November, 1920. You are familiar with that?

A. The year 1920?

Q. You know what I am talking about?

A. Yes.

Q. I think you said last time that this was an order to regulate merely a temporary situation?

A. Yes.

Q. This was at the time of theCivil War, was it not?

A. Yes.

Q. The Czarist armies were marching from the Crimea up Russia?

A. They were not Czarist armies, but armies of the Russian Republic, of the Democratic Republic.

Q. All right, at least oppositional armies?

A. Yes.

Q. Those who were on the other side of the battle?

A. Yes.

Q. Communications, because of this Civil War, with the Southern part of Russia, were interrupted, and this order was designed to serve as a temporary authority for these churches who could not be communicated with?

A. Yes.

Q. To carry on the Church work until further orders from the Patriarch, isn't that so?

A. Not until further orders.

Q. Well, look at paragraph 10, please.

A. No, this is not in paragraph 10. Please find it.

Q. Well, paragraph 10 says: "All such measures as may be taken in conformity with the present decisions [fol. 201] must upon the re-establishment of the Central Highest Church Authority be submitted to the same for confirmation."

A. Yes.

Q. All right. Now, a certain group of churches organized themselves into what is known as the Karlovitz group, did they not?

A. What?

Q. A certain group of churches——

A. Yes.

Q. All right. And isn't it a fact that in 1922 the Patriarch declared illegal the action of this Karlovitz group of churches?

A. Yes, but not because——

Q. All right. You said yes. And isn't it a fact that

that decree was dated April 22, 1922, signed by Tikhon, by Patriarch Tikhon?

A. I don't remember the date, but——

Q. Well, approximately that time. In other words, the authority that created them dissolved them, is that not so?

A. Yes.

Q. Now, this dissolution of the Karlovitz group was confirmed by another order by the Patriarch on November 10, 1923, that is a fact, is it not?

A. Maybe, yes.

Q. And again on May 9, 1928, a decree was issued, this time I think by Sergius, confirming the invalidity and illegal character of this group of Karlovitz churches?

A. Yes.

Q. So that at least from April 22, 1922, the Karlovitz group of churches had no standing at all in the Orthodox Church?

A. Would you like to hear my answer why?

Q. No, no, first I want the fact. They were dissolved by the Patriarch?

A. Yes.

Q. All right. And again, wasn't there an order entered by the Supreme Church Authority of the Patriarch Church in Russia on December 2, 1934, affirming the illegal character of the action of the Karlovitz churches? Isn't that a fact?

[fol. 202] A. I don't remember.

Q. But approximately that date?

A. I think it is all over, until now, never the Patriarchal Church acknowledgedges this Sobor.

Q. They went further. Not only did they not acknowledge it, but they ordered it dissolved and declared it uncanonical and void?

A. Yes.

Q. During this late war the headquarters of this Karlovitz group of churches was in Yugoslavia, was it not?

A. Yes.

Q. And when the Allies liberated Yugoslavia this Karlovitz group of churches moved over to Germany, when Hitler was in power, isn't that the fact?

A. No, it is not the fact. They were dispersed and came

to Germany, I think, all of them, or most of them, after Hitler's defeat.

Q. Now, wait a minute. Yugoslavia regained its independence before the final collapse of Germany, did it not?

A. Is it so? I don't remember.

Q. Don't you remember?

A. I think it is the last moments of the Hitler——

Q. Well, at any rate, these bishops, these Karlovitz bishops, when Hitler declared war on Russia, favored the Hitler side, didn't they?

A. Some of them, yes, unfortunately yes. Not officially.

Q. And when Yugoslavia was freed, these bishops found a haven and a home in Hitler's Germany, didn't they?

A. No, not Hitler's Germany, under the American protection now.

Q. Isn't it a fact that when Germany invaded Russia one of the bishops of this so-called American Church here sent a telegram to the President of the United States saying he should not send aid to Russia?

A. Yes, I think so.

Q. Now, this group of American churches, which is supposed to be headed by Metropolitan Theophilus, subordi- [fol. 203] nated itself to this Karlovitz group of churches, did it not?

A. Who subordinated?

Q. Metropolitan Theophilus and the American group of churches here, didn't they subordinate themselves to Karlovitz?

A. No, he concluded an agreement with them, but was not subordinate to them.

Q. You say the word "subordinate" is wrong?

A. In my opinion.

Q. I am talking of your opinion.

A. No, in my opinion he was not subordinate.

Q. He was not subordinate?

A. No.

Mr. Arkush: I promised Professor Fedotov that he could get away.

The Court: We will recess until 2:00 o'clock.

(A recess was thereupon taken until 2:00 o'clock P. M.)

AFTERNOON SESSION

2:00 o'clock P. M.

METROPOLITAN BENJAMIN FEDCHENKOFF, residing at 38 Halsey Street, Brooklyn, New York, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Mr. Arkush: Your Honor, his Eminence has indicated he would prefer to be examined in Russian, so I will address my questions in English and they will be interpreted.

(The following testimony was through the Official Russian Interpreter.)

[fol. 204] Direct examination.

By Mr. Arkush:

Q. Your Eminence, you are a member of the Russian Orthodox Church?

A. Yes.

Q. When did you become a member of the clergy?

A. In 1907.

Q. When were you ordained a bishop?

A. 1919.

Q. Was that during the Russian Civil War?

A. Yes, I was in Russia.

Q. Did you take part in the Russian Civil War?

A. Yes.

Q. On which side were you?

A. I was a bishop of White Army.

The Court: What was that? I didn't hear that.

(The answer to the last question was read by the reporter.)

A. (Continuing) Against Red Army.

Q. At that time you were opposed to the Bolshevik Government?

A. Yes.

Q. And you changed later in your convictions?

A. Yes, I changed.

Q. At about what time?

A. 1921-1922.

Q. When the Central Administration of the Patriarchal Church was set up in 1927, did you give the acting locum tenens a pledge of loyalty?

A. No oath was required, but loyalty to the Soviet Government was required, with the understanding that I would not participate in any political fight against the Government. But I was not under the obligation to recognize or defend this regime. I had to be non-political, not having any political affiliations.

Q. When did you come to this country?

A. 1933.

[fol. 205] Q. 1923?

A. 1933.

Q. Did you come as the representative of the Patriarchal Church?

A. Yes.

Q. Since you have been in this country have you given many lectures and addresses throughout the country?

A. Yes.

Q. And in many of those addresses have you expounded the virtues of the Soviet regime?

A. No.

Mr. Adler: I object to that question. I don't see its materiality in the case.

Mr. Arkush: He answered no.

The Court: He answered no.

Q. Do you remember making an address in Chicago a few months ago in which you were reported in the newspapers to have said that the Russian Orthodox Church and Communism are one and the same?

A. This is an absolute lie. I never talked anything like that. But I did not refute that in the papers because there were many such accusations and I didn't refute them.

Q. Did acting locum tenens Sergius demand an obligation of loyalty similar to the one given by you from the other members of the Russian Orthodox clergy abroad?

A. Yes, in the sense of refraining from political fight but not to defend the Soviet Government.

Q. What do you mean by a political fight?

A. To preach in the Church against the Soviet regime,

to talk in other places in that direction, but in the name of the Church, against the Soviet regime.

Q. Well, now, let us take a specific topic. Suppose a Russian Orthodox priest in Chicago were to criticize the Soviet regime for keeping many members of the Russian [fol. 206] Orthodox clergy in the slave labor camps in Russia, would that come within the prohibition of the pledge of loyalty?

Mr. Adler: I object to that question.
The Court: Sustained.

Q. Do you consider any criticism of the Soviet regime as a violation of that pledge?

Mr. Adler: I object.
The Court: Overruled.

A. For the benefit of our Church, our Church on the whole required any absence of criticism. It was for the good of the Church and it was an expression of the Christian attitude to the Government.

Q. And that applies to the Russian clergy abroad?

A. Yes, because the Church is one, and it was necessary for the main center of the Church in Russia, but the Church never demanded that the churches abroad should recognize Communism or anything like that.

Q. When you said it was necessary, you meant it was a necessary condition of being permitted to re-establish the Patriarchal Church Administration, didn't you?

Mr. Adler: I object to that question. There is no evidence that it was ever disestablished.
The Court: May I hear that?
Mr. Adler: I object to the form of the question.

(The pending question was read by the reporter.)

The Court: Objection sustained as to form.
[fol. 207] Mr. Arkush: I didn't hear your Honor's ruling.
The Court: Sustained as to form. It assumes facts.

Q. What was the necessity of asking the clergy abroad to give this pledge of loyalty?

Mr. Adler: I object to the question as irrelevent, immaterial, calling for a conclusion.

The Court: Overruled.

A. Because the Soviet Government suspect the Church of disloyalty against the Government, and the conduct of the churches abroad gave reasons to have suspicions about the conduct of the Church in Russia.

Q. Did that apply to the American Church?

A. Yes, sir.

Q. In what respect?

A. Metropolitan Platon was known in Russia as an opponent to the Soviet Government, and the whole number of facts about the American Church, that the American and the whole number of facts pertaining to the American Church proved that there was an opposition to the Soviet Government, without any doubt.

Q. Is that what is referred to in your Eminence's appointment in the recital reading, "They referred to the decision of his Holy Eminence, the Patriarch, and his Holy Synod, dated January 16, 1924, No. 28, as follows: 'As we have data proving that the Metropolitan of North America has engaged in public acts of counter-Revolution directed against the Soviet power and of disastrous consequences to the Orthodox Church, Metropolitan Platon will be dismissed?' "

[fol. 208] Mr. Arkush: Would you like the stenographer to read the first part of the question back to you?

The Interpreter: Yes.

(The pending question was read by the reporter.)

A. It was written by the Metropolitan Sergius, not by myself, and they probably had reasons to do so.

Q. Do you have personally any knowledge of what is called public acts of counter-Revolution by Metropolitan Platon against the Soviet power?

Mr. Adler: Excuse me. I don't think it matters. It is immaterial whether he has knowledge of these things or not. It is the Higher Church Authorities who decide these questions and not he.

Mr. Arkush: I think the law is very clear that while a civil court will not pass on the canonical legality of a de-

cision by a Church Judicatory, in a civil court you can always go into the question as to whether there was a trial, a fair hearing, or whether there was a judgment. I am going to show that there was never any judgment whatever. The defendant never appeared.

Mr. Adler: There is a declaration of policy by the Chief Church Authorities.

Mr. Arkush: Policy is all right, but that he was tried by a church tribunal has certainly not appeared as yet. I am going to ask Metropolitan Benjamin whether he was nor not.

The Court: Overruled.

[fol. 209] Mr. Arkush: Will the stenographer repeat the question?

A. I remember the question. When I met Platon and asked him whether he is politically active in the Church he told me, "I have stopped it now." Since he had "stopped now," the matter probably stood differently before. And when he separated from the Church, he issued a declaration in which he openly opposes the Soviet regime.

Q. When you say "separated from the Church," you don't mean that he did anything inconsistent or different from what was declared at the Sobor of the American Church held at Detroit in 1924, do you?

A. This Sobor was private, had not been approved by the Highest Church Authority, and in view of this it is not binding to the Church.

Q. Yes, I understand that to be your position, but what I wanted to know was whether you considered Metropolitain Platon's action, which you characterized as "separation", to be anything else but carrying out the decision of the Detroit Sobor?

Mr. Arkush: I will withdraw the question. I think I can simplify it for him.

Your Honor understands that at Detroit in 1924 the delegates of the American parishes adopted resolutions of temporary autonomy which are already in evidence in this case.

The Witness: (In English) I know.

By Mr. Arkush:

Q. You don't mean to imply that Metropolitan Platon went any further than those resolutions permitted? He was simply carrying them out when he made his declaration?

[fol. 210] A. No. He, Metropolitan Platon, told me that in matters of the Church he recognizes the Metropolitan Sergius and then he separated.

Q. These conversations were in 1933 or 1934, were they?

A. I still have documents proving that, a cable that we sent to Metropolitan Sergius.

Mr. Adler: We just want to know the date, not all this. When did these conversations happen?

The Witness: In June, 1933, and when the question came up about the ordination of Reverend Turkevich as the Archbishop Leonty, I suggested to Metropolitan Platon to send a telegram to Metropolitan Sergius, as the head of the Patriarchal Church, that he would permit and bless the ordination into monkhood and his ordination as a bishop. And the Reverend Iliansky, now the Archbishop Makary, he wrote a cable for us and we sent it, the following contents:

"We ask for permission and your blessings to ordain into monkhood the Reverend Turkevich and ordain him as bishop."

And this cable was sent. I still have a copy of it. Consequently, Metropolitan Platon recognized Metropolitan Sergius and asked permission for the ordination.

By Mr. Arkush:

Q. And was it given?

A. And we received it. He gave the following answer: "To begin with, ask Metropolitan Platon to publish in the newspapers that you wrote to me in the cable, that is to say, that he recognizes Metropolitan Sergius as the head of the Church and is not active in politics." Before [fol. 211] sending the cable I showed to Metropolitan Platon whether he does agree, and he agreed. But Metropolitan Platon refused to publish it in the newspapers, what he had told me personally, and about the cable that

was sent, that he was not active in politics and recognizes Metropolitan Sergius, and then he separated from the Church.

Mr. Adler: May the record show that Reverend Turkevich, that the witness referred to, is the bishop who testified on behalf of the plaintiff earlier in this case?

Mr. Arkush: Yes, it is stipulated that Bishop Turkevich is now Archbishop Leonty Turkevich.

Q. Now, did you ever hear of any public acts of counter-Revolution directed against the Soviet power engaged in by Metropolitan Platon, other than writing or speaking in criticism of the Soviet Government?

A. In Russia he conducted an open fight against the Soviet regime and I don't know what was done in America, because I wasn't here.

Q. Well, did you ever hear of any acts other than writing or speaking against the Soviet Government?

A. I was living in Europe. I didn't occupy myself with those questions.

Q. Was Metropolitan Platon given a Church trial before he was dismissed?

A. No, and he wasn't let off before I came here, and he refused to subjugate himself.

Q. To have a Church trial, he would have had to go back to Russia, wouldn't he?

A. That matter was at the time of Patriarch Tikhon. Metropolitan Sergius did not demand that.

[fol. 212] Q. Well, I am referring to the dismissal that is recited in your Eminence's appointment, the one of January 16, 1924. That was in the time of Patriarch Tikhon, was it not?

A. Yes.

Q. I show you Item No. 3, in paragraph 1 of that Ukase which the interpreter can read to you in Russian, or your Eminence can read it.

A. That was done not by the Metropolitan Sergius, but by Patriarch Tikhon.

Mr. Arkush: For the benefit of the Court, I will read it in English:

"Metropolitan Platon will be invited to come to Moscow to put himself at the disposal of the Patriarch."

The Witness: Yes.

Q. So, to have a Church trial he had to go to Moscow to be tried?

A. Of course.

Q. And you say he was a reputed or a noted counter-Revolutionary in Russia?

A. Yes.

Q. And in 1924, assuming that he could have gotten into Russia, he would have been immediately arrested and prosecuted, wouldn't he?

Mr. Adler: Wait a minute.

Mr. Arkush: I ask the Court to take judicial notice of that fact, but——

The Court: Sustained.

Q. You were with the White Army, your Eminence said?

A. Yes.

Q. When the soldiers of the White Army were in the South of Russia and they went to church, the priests prayed for the White Army, didn't they?

A. Yes.

Q. And those priests later, at the end of the Civil War, were prosecuted by the Government for having prayed for [fol. 213] the White Army, weren't they?

Mr. Adler: Just a moment. I object to that question.

Mr. Arkush: All I am trying to show is that if Metropolitan Platon was a noted counter-Revolutionary and if all a man had to do to go to Siberia was to have prayed for the White Army, he certainly would have gone to Siberia, if he hadn't been shot.

Mr. Adler: Under Church law, he didn't have to go to Moscow for a trial. He could have had a trial here, through documents. There have been thousands of trials on documents.

Mr. Arkush: He was ordered to go to Moscow.

Mr. Adler: He could have had the trial through documents. You know that.

Mr. Arkush: Did his Eminence answer the last question?

Mr. Adler: The witness wants to answer the question and since he is a dignitary of the Church no mere lawyer ought to stop him. So if he wants to answer, let him.

(The pending question was read by the reporter.)

A. During the struggle against the Reds the White soldiers prayed in the churches for victory, and I prayed myself.

Mr. Arkush: He didn't answer the question, but it is all right with me.

Q. You are familiar with the ancient canons of the Church, are you not, your Eminence?

A. Sufficiently.

[fol. 214] Q. The canons of the first Council of Constantinople, held 381 A.D., are accepted by the Russian Orthodox Church, are they not?

A. In respect to what?

Q. Trials of bishops.

A. Yes.

Q. I will now read from the sixth canon of the first Council of Constantinople, not all of the canon, but a part of it: "But if any, being neither heretics, nor excommunicated, nor condemned, nor under previous accusation or alleged fault, should declare that they have any ecclesiastical charge against the Bishop, the Holy Synod bids them first lay their charges before all the Bishops of the province, and before them prove the accusations, whatsoever they may be, which they have brought against the Bishop."

Mr. Adler: Your Honor, I object to that portion read by Mr. Arkush because he is not reading the canon. He is reading a commentary, an interpretation of it.

Mr. Arkush: No, it is the canon.

Mr. Adler: No, no.

The Court: Ask him. He is a Church dignitary. He ought to know.

Q. Did I read from the Church canon? I read here. Is this the canon?

Mr. Adler: Your Honor, while the witness is reading, I have the additional objection that it is immaterial whether Platon received a trial or not. I don't see how that is an issue in the case.

(Discussion ensued off the record between the Court and counsel.)

The Court: The objection is overruled.

A. Yes, I read.

[fol. 215] Q. It is the canon?

A. Yes. (In English) Why you ask me?

Q. I am also asking you whether the canons of Carthage are also sometimes called the African Code and are accepted by the Orthodox Church?

A. Yes.

Q. I am reading from Canon 19: "Whatever Bishop is accused, the accuser shall bring the case before the Primates of the province to which the accused belongs and he shall not be suspended from communion by reason of the crime laid to his charge, unless he fails to put in an appearance on the appointed day for arguing his cause before the chosen judges, having been duly summoned by the letters; that is, within the space of one month from the day in which he is found to have received the letters. But should he be able to prove any true necessity which manifestly rendered it impossible for him to appear, he shall have the opportunity of arguing his case within another full month; but after the second month, he shall not communicate until he is acquitted.

"But if he is not willing to come to the Annual General Council so that his cause may there be terminated, he himself shall be judged to have pronounced the sentence of his own condemnation at the time in which he does not communicate, nor shall he communicate either in his own church or Diocese."

Then I am going to ask you——

Mr. Adler: I make the same objection, your Honor.

The Court: Overruled.

Q. (Continuing) —whether the Apostolical Canons are accepted in the Russian Orthodox Church?

A. Yes.

[fol. 216] Q. And I am going to read Canon 74: "If any Bishop has been accused of anything by men worthy of credit, he must be summoned by the Bishops and if he appears and confesses or is convicted, a suitable punishment

must be inflicted upon him. But if when he is summoned he does not attend, let him be summoned a second time, two bishops being sent to him for that purpose,"—and then in some texts this matter is put in square brackets: "But if even then he will not attend, let him be summoned a third time, two Bishops being again sent to him"—close the square brackets—"but if even then he shall disregard the summons and not come, let the Synod pronounce such sentence against him as appears right, that he may not seem to profit by avoiding judgment."

Now, when the Patriarch and his Synod suspended Metropolitan Platon by decree of 1924, No. 28, were they acting under those canons?

A. Yes.

Q. In other words, they took what we lawyers in this country call a default judgment against him?

A. Yes, of course. Permit me to explain it.

Q. Yes.

A. Metropolitan Platon wrote a declaration, and in this declaration he says, first, that he is separating from the Church. That is the first wrong he is doing. But he did things much worse than that. He accused the entire Russian Church of becoming a slave of the Godless Soviet Government and is aiding Godless Government in its fight against God. Any accusation greater than that is impossible.

Q. What was the canonical basis for demanding any pledge of loyalty from any of the Russian Orthodox clergy? [fol. 217] Mr. Adler: Excuse me. There is no evidence there was any pledge of loyalty. It is a question of agitation in Churches against the Government.

Mr. Arkush: When I say "pledge of loyalty," I mean that pledge which his Eminence has testified to.

A. Loyalty is understood as refraining from politics only. And it was necessary for the good of the Church, and who knows better the good of the Church than the Church itself over there? That is all.

Q. But you have said that refraining from politics means refraining from speaking or reading in criticism of the Soviet Government?

Mr. Adler: In churches.

Mr. Arkush: No, he said outside churches also.

A. Both in church and in the name of the Church.

(In English.) For example, you may criticise Soviet Government, but only as private men. If you speak I am lawyer of Russian Church in America, I speak from American Church, it is impossible.

Q. When Bishop Manning signs a letter, as retired Bishop of New York, and publishes it in the New York Times, criticising the Government of Yugoslavia, do you consider that a political act?

Mr. Adler: Excuse me.

The Court: Sustained.

Q. Yet you haven't answered my question. Will you point out to me any provision of the Statutes of 1917-1918 or of the ancient Canons or of the Scriptures which justi- [fol. 218] fied the acting locum tenens to require from the clergy abroad any obligation whatever to refrain from what you call political activity?

A. Yes.

Mr. Adler: I object to the question on the ground it is already answered. The witness says it is a matter of high church policy which is decided by the high church authorities.

Mr. Arkush: That doesn't make it canonical.

The Court: Overruled.

A. Jesus Christ himself said, "Give to God what is God's and to Caesar what is Caesar's." In the Church canons we have nothing to indicate that members of the Church should be active in politics. But, on the contrary, *is* is pointed out that peoples of the Church should not occupy themselves with affairs of the world, that members of the Church should not occupy themselves with affairs of the world.

Q. But there is nothing in the Statutes of 1917 or 1918 on the subject?

A. This matter was not put up.

Q. Let us take up the words by Jesus Christ. Where did Jesus say those words? In what part of the world?

A. In Palestine.

Q. And Palestine was a part of what larger political unit?

Mr. Adler: We can stipulate all those things.

A. Of the Roman Empire.

Q. Jesus also said, "Go to all corners of the world and [fol. 219] preach the Gospel," didn't he?

A. But not politics.

Q. All right. Now, if a Christian missionary at the time of Jesus had gone outside the boundaries of the Roman Empire, do you think that what Jesus said required that missionary to be loyal to the head of the Roman Empire?

Mr. Adler: Just a moment.

The Court: Sustained.

Q. Do you construe the words of Jesus as requiring the citizens of the United States or of Canada to be loyal in any way, shape or manner to the Russian Government?

Mr. Adler: I object to that, your Honor. It doesn't matter what this witness considers.

(Discussion ensued off the record between the Court and counsel.)

Q. Now, this obligation of loyalty or this policy——

Mr. Adler: I object to the use——

The Court: Sustained as to form.

Q. I again want to make sure, your Eminence, that when you talk about political activity you don't mean what we Americans usually call political activity, that is, actively running for office or supporting candidates for office, but merely mean public speaking and writing, is that correct?

A. The answer of the Russian Church is absolutely clear. It cannot prevent any citizen from fulfilling his obliga- [fol. 220] tions, and does not demand it. It only demands refraining from opposing the Soviet Government, refraining, but not subjugating to it. And I am repeating, that is for the good of the Church. It is an obligation of the Church to act in this manner.

Q. When you say "opposing the Soviet Government," you mean criticising it in speeches or writing?

A. As individuals, they may criticise, but they cannot do that in church or in the name of the Church because that would be injurious to the Church. Patriarch Tikhon pointed that out too literally in these words, "Understand at last that your political actions abroad are injurious to the Church, not to the Soviet regime, but to the Church."

Q. That policy which your Eminence has referred to of requiring some kind of an obligation, whatever it was, from the clergy abroad continued continuously from 1927 to the present day, did it not?

A. It demands that a member of the clergy occupy himself with spiritual matters, and nothing more.

Q. No, I asked as to whether the policy of the Central Administration of the Patriarchal Church in this regard was continuous from 1927 to the present time?

A. Yes.

Q. You advised the present Patriarch just prior to his election that an essential condition of reunion between the Mother Church and the American Church was the fullest loyalty to the Soviet power, did you not?

A. (In English) Yes.

Q. And you received a letter from the *locum tennes Alexis*?

A. Yes, I received.

Q. Stating that?

A. I advised.

[fol. 221] Q. And you advised him that you didn't think that the American Church would accept that condition, did you?

A. I wrote him directly that this condition will be difficult to accept by the American Church and asked him to remove this question, to strike out this question.

Q. But, nevertheless, he did not follow your advice, did he?

A. In his Ukase of 1945 he made the demand that the Church refrain from opposition to the Soviet regime.

Mr. Arkush: That is already in evidence, your Honor.

Q. That was rejected by the American Church, the Ukase?

A. (No answer.)

Q. I will ask the question: Was the Ukase, marked Defendants' Exhibit D, the Ukase of February 14, 1945,

which contains this condition, that the American Sobor: "In the name of the American Orthodox Church declares its abstention from political activity against the U.S.S.R. and gives corresponding orders about this to all the parishes"—that Ukase was rejected by the American Church, was it not?

A. Yes. You know.

Q. The Judge doesn't know.

A. But you know.

Q. The Judge doesn't know.

Mr. Adler: There is no evidence that it was ever submitted to them or what action they took about it.

Q. Were you present at the meeting between the Patriarch and his Synod with the delegates, Bishop Alexi of Alaska, and Father Dzvonchik of the American Church?

A. No.

Q. Your Eminence was not present?

A. No.

[fol. 222] Q. But you were in Moscow, were you not?

A. Yes.

Q. And you do know that they appeared, that American bishop and American priest, before the Patriarch and the Holy Synod?

A. They came after the Sobor.

Q. They got there late?

A. Yes, a day late.

Q. After they got there they called on the Patriarch and he was surrounded by the members of the Synod, is that right?

A. I didn't see it and I didn't participate in it.

Q. Well, you have read the reports published both in our papers and in the papers of the Patriarchy, have you not?

A. I wasn't at the time here in America.

Mr. Adler: I will stipulate, if you want me to.

Mr. Arkush: All right.

Mr. Adler: I think it is already in the record.

Mr. Arkush: Part of it is already in.

It is stipulated that Bishop Alexi and Father Dzvonchik, representing the local group of American Churches under Bishop Theophilus, appeared before the Patriarch and the

members of his Synod in Moscow, presented a written report on the condition of the American Church, with a request for autonomy and a few days later received from the Patriarch the Ukase which has been marked Defendants' Exhibit D.

Mr. Adler: I understand that to be the fact, and then these gentlemen brought it back to the United States.

What happened after that?

[fol. 223] Mr. Arkush: Well, I can call Archbishop——

Mr. Adler: Tell me the facts.

Mr. Arkush: It is further stipulated that that Ukase was considered by the members of the Metropolitan Council of the Russian Orthodox Catholic Church in North America, which issued a statement on the Ukase which I will now offer.

Mr. Adler: There are a lot of self-serving declarations in there.

Mr. Arkush: It has to be self-serving. It is the reason we rejected the Ukase and gives the reasons.

Mr. Adler: If you think it is going to help your Honor it is all right, but in my opinion it is immaterial and irrelevant.

The Court: I will take it.

(Received in evidence and marked Plaintiff's Exhibit 16.)

By Mr. Arkush:

Q. Your Eminence, you did claim to be the Archbishop of this Diocese?

A. Yes.

Q. Under the appointment of 1935 which is in evidence?

Mr. Adler: 1934 it is.

A. 1933-34.

Mr. Arkush: It is dated here June 29, 1934.

Mr. Adler: That is right, that is final. The other one was temporary.

Q. Didn't the Statutes of 1917-1918 of the Russian Orthodox Church require that the bishop of a diocese be [fol. 224] elected by the clergy and laity of that Diocese?

A. No, not at all. The laws require, the Sobor of 1917-1918 requires that missions should be appointed.

Q. Don't you know the Russian American Mission became a diocese before the Council of 1917-18?

A. It was a diocese but it was a missionary diocese and the bishops, they are appointed in the missions.

Q. Well, now, I call your attention to the provisions of the Statutes of 1917-18, which are in evidence, providing for the calling of bishops from the dioceses to the Synod, in which the Church is divided into groups, and in the Fifth Group are included the North American Diocese and the Japanese, Chinese, and some other word which evidently is misspelled, missions, so in those Statutes there was a distinction made between the missions and the dioceses, was there not?

A. It is only a difference of terminology, but not of essence.

Q. I also call your attention to Section 16 of the Chapter on Diocesan Bishops in which it says that, "Bishops shall be elected by the clergy and the laity," and then it has three notes. The first note is that, "In extraordinary and exceptional cases, the bishops may be appointed by the Supreme Church Authority." What was there extraordinary or exceptional which prevented your Eminence being elected by the American Church?

Mr. Adler: Just a moment. I object to the form of the question. It assumes a lot of facts which are not so. Mr. Arkush is confused, because the testimony in the case has been that as far as missions or dioceses are concerned, it doesn't matter what, the Archbishop is appointed by [fol. 225] the Supreme Church Authority. The section he refers to refers to the election of bishops of local dioceses within the territoy of Russia.

Mr. Arkush: That is the only section there is.

The Court: Let him explain it. If that is the answer, he will explain it.

Q. I will repeat the question. Was there anything exceptional or extraordinary to prevent your Eminence being elected at a Sobor of the American parishes?

A. I didn't think of it. I didn't know about it. I came to America——

Q. You have answered the question. Now I call your attention to the second note to that Section 16: "In a diocese where a large missionary activity shall be developed and where many non-Russians are living—" —and that is what you call a missionary diocese, isn't it?

A. You can say it this way or that.

Q. Then I am going to continue reading:— "the Diocesan Bishop shall be elected among the candidates who have experience in missionary work." And then it goes on, "Otherwise bishops to such dioceses may be appointed by the Supreme Church authority." Now, didn't practically all of the bishops and a great many of the priests of the American Church have experience in missionary work?

A. I think so, probably.

Q. Was any attempt made to have a meeting, a Sobor of the American Church, for your election?

The Interpreter: Should I say is his Eminence supposed to have made any efforts or did anybody else?

[fol. 226] Q. Well, did anybody call a Sobor for the election of Metropolitan Benjamin?

A. I was appointed by the Patriarch and the Holy Synod.

Q. Your Eminence sent a message to the Cleveland Sobor of 1934, did you not?

A. Yes.

Q. In which you exhorted that Sobor to submit to the Patriarch, is that right?

A. I could not have written it. (In English.) Maybe I don't understand the question, maybe.

Q. Well, many years after Metropolitan Platon died, the Patriarchal Church forgave him, didn't they?

A. Yes, I asked for it.

Q. What has happened since your coming here, your Eminence, as between the Patriarchal Church and the American Church?

Mr. Adler: That is a long order.

The Court: Are we going over all this again?

Mr. Arkush: Well, strike it out.

Q. How many parishes are there in the American Church?

A. About fifty, but I do not consider the number or quantity as a criterion of truth. Jesus Christ has only twelve Apostles and then the entire world became Christian. Quantity doesn't designate truth.

Q. When you say that there are fifty parishes in the American Church, you mean there are fifty parishes which did recognize your Eminence as ruling Bishop, is that right?

A. Yes.

Q. Have you a list of those parishes with you?

A. Yes.

Q. May we have it?

A. I have it home.

Mr. Adler: What materiality would the names of the parishes have?

[fol. 227] Mr. Arkush: Will counsel produce that list before the end of the trial?

Mr. Adler: I have never seen it and don't know a thing about it. I don't know what it has to do with the case.

Mr. Arkush: I would like to have it produced. In the first place, I think the estimate is somewhat wild, and I think it has some materiality.

Q. Will you produce that? Will you let us have that? Give it to your lawyer.

A. (In English) When to bring it?

Q. As soon as you can.

A. All right.

Q. It is true, is it not, that the parishes, the Russian Orthodox parishes in the United States, Canada and Alaska did not generally accept your Eminence as Ruling Bishop?

A. It does not mean that the parishes didn't recognize me. It was due to Metropolitan Platon and those close to him.

Q. And after the death of Metropolitan Platon the same condition continued, did it not?

A. Yes, because his successors, priests, bishops, continued the same attitude. They could have acted entirely differently, but that it is so is proved by the Sobor in Cleveland in 1946, because during that Sobor the majority of the clergy and the laymen demanded the recognition of the Patriarch in opposition to the Archbishops.

Q. Your Eminence, as the vote was secret, I don't know how you know who voted for what, but I won't question you on that. Have you seen the telegram that was sent by Metropolitan Theophilus after the Cleveland Sobor to the Patriarch?

[fol. 228] Mr. Adler: It doesn't matter. If you say it was sent, that is all right. I don't know that the materiality of it is. But it is part of the general picture and if the Judge feels it will be of help, put it in.

Mr. Arkush: I offer a copy of a telegram sent January 21, 1947, by Metropolitan Theophilus to the Patriarch.

Mr. Adler: Offer all three together.

Mr. Arkush: Yes.

I offer an English translation of a cablegram received in Russian under date of January 25, 1947, from the Patriarch in reply to the earlier message.

Mr. Adler: That is subject to translation corrections.

Mr. Arkush: And I offer a telegram sent in English on January 31, 1947, replying on the part of Metropolitan Theophilus to the cablegram from the Patriarch.

I think your Honor has seen all of this.

(Received in evidence and marked Plaintiff's Exhibits 17, 17A and 17B, respectively.)

By Mr. Arkush:

Q. Who is Metropolitan Gregory of Leningrad and Stalingrad?

Mr. Adler: I will concede that he is the representative of the Patriarch of Moscow, and he came to this country, was it a month or two ago, with a view to negotiating with the representatives of this group of American churches to see whether a basis of adjustment of their re- [fol. 229] spective differences could be had, and that negotiations have been carried on between the parties.

Mr. Arkush: And he has full power?

Mr. Adler: I understand he has full power to work out an arrangement. Whether ultimately, before it is actually signed, he has to submit it to the Patriarch I don't know, but he has sufficient power to formulate or come to an understanding with this group as to what the proper relationship should be.

Mr. Arkush: I now offer, your Honor, a resolution of the Metropolitan Council of the American Church, giving its definition of the autonomy that was voted at the Cleveland Sobor of 1946, English and Russian texts of which were delivered by Metropolitan Gregory.

Mr. Adler: I may have seen this or not. I don't know. I don't know what the contents of them are. I think they are negotiations. Whether the parties would want them published or not I really don't know. Ultimately I don't think it matters what people say in the course of coming to an understanding.

The Court: What have these negotiations to do with the issues in this case?

Mr. Adler: I don't know.

Mr. Arkush: I think there is a rather important statement in here. In response to that resolution which was handed to Metropolitan——

The Court: What is the date of that resolution?

[fol. 230] Mr. Arkush: It is not dated, but it is referred to in this response as of August 7th.

Mr. Adler: Of this year?

Mr. Arkush: Of this year. In response to that Metropolitan Gregory wrote a letter in which he stated, and he is the authorized representative of the Patriarch, "His Beautitude, the Patriarch, is in agreement with the resolution of 1946 Cleveland Sobor, that the periodical American Church Sobore"——

Mr. Adler: Will you stop here a moment?

Mr. Arkush is doing the very thing I want to avoid doing. The whole issue is whether these things can be published or put on the record, negotiations between the parties. I have no objection to the Judge seeing it. Whether it should be made a public record is another matter.

The Court: These are negotiations to settle this pending lawsuit?

Mr. Adler: No, sir, this lawsuit——

The Court: No. Does it involve the settlement of this lawsuit?

Mr. Arkush: The lawsuit isn't mentioned.

The Court: If the difficulties are settled, the lawsuit would be settled.

Mr. Arkush: They would. But that was not the subject of the negotiations. They are statements of position, and I think the Judge is entitled to know what the Patriarch's position in regard to that Cleveland Sobor is. He elaborates what he says in his telegram. That is the point. However, I don't press it.

[fol. 231] Mr. Adler: I don't think you should, because it may be unfair to both parties to publicly reveal what they passed to each other in confidence.

Mr. Arkush: I have no further questions.

Cross-examination.

By Mr. Adler:

Q. The Russian Church is governed by the canons of the first seven Ecumenical Councils, is it not?

A. Yes.

Q. And, in addition, the Russian Church is also governed by a number of rules and usages and customs which have developed over hundreds of years?

A. Yes.

Q. With respect to the authority of the Supreme Church Authorities over a bishop, isn't it a fact that the Supreme Church Authorities have a right to call a bishop back to report to the Supreme Church Authorities, or suspend him, or take any action with respect to him that they want?

A. Yes.

Q. And that may be done without a trial?

A. In extraordinary cases.

Q. In other words, a bishop may be suspended and told not to function until further order of the Patriarch?

A. And until trial.

Q. But in the meantime until the trial——

A. As a preventive measure.

Q. That is right. Then the time and method of trial is a matter that is determined by the Patriarch and the usages of the Church, is it not?

A. Yes.

Q. Is it not customary in the Russian Church, and for that matter, in other Orthodox Churches, that trials be

had on documents, on written depositions and statements?
[fol. 232] A. And that can be the case, too.

Q. It is not necessary to have an actual trial where the accused appears in person before a tribunal?

A. If there is written proof, written proof is enough without trial, particularly under extraordinary circumstances.

Q. Now, the Supreme Church Authority of the Russian Church lays down the policy of the Church and what it regards as good or bad, inimical to its interests, does it not?

A. Yes, that is an obligation of any higher authority.

Q. And when the policy of a Church is laid down by the Supreme Church Authorities, on any subject, is it the duty of every subordinate branch of that Church and every member of that Church to abide by the policy as laid down by the Supreme Church Authority?

A. Yes, if they do not want to be revolutionaries against the Church.

Q. If the Supreme Church Authority takes a position on any question affecting the Church, may any one bishop or group of bishops oppose that policy?

A. According to the Church Law, they have not the right. They have to subjugate themselves.

Q. Subject themselves?

A. Subject themselves.

Q. With respect to the trial of Metropolitan Platon, was it necessary for him to go to Moscow for a trial or could he have had a trial of his case on depositions and documents?

A. Absolutely not because the fact of his separation was known, also the fact of his declaration.

Q. I am not quite sure you answered my question. I want to know whether Metropolitan Platon, if he had wished a trial, could have had a trial on documents and stayed in the United States, and have had the Supreme [fol. 233] Church Authority in Russia decide on any documents that he wished to submit. It could have been done if Platon had wanted it, isn't that so?

A. Yes.

Q. In your appointment dated June 29, 1934, as Archbishop of the American Archdiocese, there is reference

to a decree of the Patriarch and the Holy Synod declaring schismatic the religious group organized around Metropolitan Platon. Under the rules of the Russian Church did the Supreme Church Authorities in Russia have the power to make that declaration?

A. Yes.

Q. And upon such declaration was it the duty and obligation of every bishop and clergyman of the Russian Church to abide by that declaration and not oppose it?

A. If they don't want to, nobody can compel them.

Q. Yes. But canonically it is not permissible?

A. They have to, according to the canons.

Q. Reference has been made to Section 16 of the Rules of the Sobor of 1917 concerning the election of certain bishops of certain dioceses, and reference has also been made to the provision that "Bishops to the Foreign Missions shall be appointed by the Sacred Synod"—do you recall that?

A. Yes.

Q. Now, isn't it a fact that Bishops of Foreign Missions or Foreign Dioceses or Foreign Archdioceses, that is, Missions, Dioceses or Archdioceses outside of Russia are to appointed, not elected, appointed by the Supreme Church Authorities?

A. Yes.

Q. That is the rule?

A. Yes.

Q. And it always has been the rule?

A. That was the rule all the time since the foundation of the American Church.

[fol. 234] Q. That is right. Before 1917 and after 1917, isn't that so?

A. Yes.

Q. Now, the references in Section 16 of these enactments of the Sobor of 1917, relating to the election of bishops, does not that Section refer to the election of bishops of local dioceses within the Russian territory and not to Foreign Archdioceses or Missions?

A. In all Missions and Churches Abroad, the bishops were appointed.

Q. I understand. But with respect to dioceses within Russia?

A. They were elected.

Q. But even when a bishop was elected in a diocese within Russia, wasn't the election of that bishop nevertheless subject to the confirmation of the Supreme Church Authorities?

A. The elections had to be confirmed and prior to the elections the candidates must have been approved by the Highest Church Authority.

Q. That is right. And, referring to Section 2 of Part IV of the Enactments of the Sobor of 1917, entitled: "Enactments concerning the categories of affairs within the jurisdiction of the organs of the Supreme Church Administration, December 8, 1919," Section 2 provides: "Confirmation of bishops elected to the diocese in their office, their appointment in proper cases, and their retirement" —did you understand me? That was within the power of the Supreme Church Authorities specifically provided in the Sobor of 1917, was it not?

A. And according to the general laws of the Church.

Q. That is right. In other words, in the American Archdiocese, if a number of bishops, one or fifty, in the American Archdiocese got together and elected, purported to elect an Archbishop of the American Archdiocese without [fol. 235] confirmation by the Supreme Church Authorities in Russia, would such an Archbishop have any standing under the rules and usages of the Russian Church?

A. He would be declared illegal.

Q. Yes. Now, it is the practice and custom under the rules of the Russian Church that the Archbishop appointed by the Supreme Church Authorities in Russia occupy and use Saint Nicholas Cathedral as his residence and place of worship, is it not?

A. Yes.

Q. In October, 1945, did you take possession of Saint Nicholas Cathedral?

A. Yes.

Q. And did you hold religious services in Saint Nicholas Cathedral?

A. Yes.

Q. And did you sleep there from time to time?

A. Yes.

Q. And you occupied that Saint Nicholas Cathedral as Archbishop of the Archdiocese?

A. Yes.

Q. Did you, after October, 1945, publish this stationery relating to your office?

A. Yes.

Q. As Archbishop?

A. Yes.

Mr. Adler: I offer it in evidence.

(Received in evidence and marked Defendants' Exhibit G.)

Q. When Metropolitan Sergius became the Patriarch of Moscow in 1946, was it?

A. 1943.

Mr. Arkush: Sergius died in 1944.

Q. In 1945, did Archbishop Alexis——

A. Not Archbishop, Metropolitan.

Q. All right, Metropolitan Alexis—come from the Patriarch at Moscow to the United States?

A. The Ambassador of Patriarch you are talking about.

[fol. 236] Q. The ambassador, yes.

A. Yes, Ambassador of the Patriarch.

Q. He came to the United States as an Ambassador from the Patriarch to the United States in 1945?

A. Yes, September.

Q. How long did he stay in this country?

A. Six months.

Q. During that period while he was in the City of New York did he live and hold services in Saint Nicholas Cahedral?

A. Yes.

Q. You possessed, occupied and used Saint Nicholas Cathedral from about October, 1945, until——

A. 6th of June, 1947.

Q. I say you occupied the Cathedral until about June 6, 1947, when you left pursuant to a stipulation entered into on applications for adjournment of this case—that is a fact, is it not?

A. Yes.

Mr. Adler: All right.

I would just like to call your Honor's attention to the fact that in Plaintiff's Exhibit 16, I call your Honor's attention to a statement on page 6, reading as follows:

"The Council of Bishops find it necessary to recommend to the clergy of the Metropolitanate for the general welfare not to touch upon political questions and not to make any public speeches on the subject, especially from the pulpit", the subject being referred to as political activities against the U.S.S.R. That is a statement issued by the head of the group of churches in the United States.

Re-direct examination.

By Mr. Arkush:

Q. Your Eminence, how did you get possession of the 97th Street Cathedral in 1945?

[fol. 237] A. Father Kedrovsky, who formerly had recognized the Renovated Church, now recognized the Patriarchal Church, and surrendered the Cathedral to the Patriarchal Church. It was done by Archbishop Alexis, Ambassador of the Patriarch.

Q. Now, Kedroff, John Kedroff, claimed to be a priest of the Russian Orthodox Church before he surrendered the Cathedral to you, didn't he?

[fol. 238] Mr. Adler: As I say, I am willing to stipulate that the defendant Kedroff claimed to be a priest by virtue of a prior ordination of another bishop.

Mr. Arkush: He also claimed possession of the premises in question in this action, under one Christopher Contogeorge, who he claimed in an affidavit in this action to be the Archbishop of the Russian Orthodox Church in America.

Mr. Adler: All right he made that claim in an affidavit and then Metropolitan Benjamin and the Ambassador, Archbishop Alexis, the Ambassador from the Patriarchal Church in Moscow, came to the United States and he said, "Well, I made a mistake. I recognize you as the Chief Church Authority. Ordain me all over again." They did, and he gave them the Cathedral. That is the fact.

By Mr. Arkush:

Q. You said, your Eminence, that Platon could have been tried in the United States. He wouldn't have received [fol. 239] a trial by his fellow bishops as required by the canons if he had been tried in the United States, would he?

A. They did not have a sufficient number of Bishops here.

Q. To try him in the United States?

A. Yes, and we were not the Supreme Church Authority.

[fol. 240] New York, N. Y., October 16, 1947,

TRIAL RESUMED

10:00 A. M.

GEORGE P. FEDOTOV, resumed the stand and testified further as follows:

Cross-examination.

By Mr. Adler (Continued):

Q. I think, Professor, we were talking about the Karlovitz Synod when we adjourned last time?

A. Yes.

Q. Now, the foundation for the organization or the authority for the organization of this Karlovitz Synod was this order of Patriarch Tikhon dated November 20, 1920, was it not?

A. Yes.

Q. Is there any other authorization for the creation of this Karlovitz Synod?

A. No, so far as I know.

Q. Very well. I think we agreed that this organization of November 20, 1920, was a temporary one because of the interruption of communications, and designed to terminate once communications, with the Central Church Authorities was established, is that right?

A. It is the text of this document.

Q. It purports to say that?

A. No, it is different.

Q. How different?

A. The Synod itself could consider its power in different terms than this document. It is different.

Q. But wasn't the reason for the issuance of this order of 1920 the fact that there were no communications between Patriarch Tikhon and the bishops outside of Russia because of the Civil War? Isn't that the fact, just yes or no?

[fol. 241] A. I refuse to answer in so simple form, yes or no, because we must distinguish between yes and no. There is truth practically always.

Q. Please make it brief and accurate.

A. Yes, brief. I don't defend this Synod, don't defend. but I suppose that the members of the Synod had other grounds of reason besides——

Q. I am not interested in psycho-analyzing the minds of these bishops. I am interested in authority which was given by the Patriarch of Moscow. That is all I am interested in.

A. Yes. There is no doubt that as far as the Patriarch of Moscow goes this is the only authority he gave to the Karlovitz Bishops.

Q. Is that right?

A. Yes.

Q. And this authority was given because of the failure or the interruption of communications between the Patriarch and the bishops outside of Russia because of the Civil War, isn't that the fact? You can answer yes or no, can't you?

A. No. It can be interpreted in different ways.

Q. All right. Is that a legitimate interpretation?

A. I think there is a legitimate——

Q. Well.

A. No, not yours. The legitimate interpretation that the break of communications means not only the postal break, you know, but it can be a juridical, social, political and moral break, so in the opinion of the Synod and of my own——

Q. And your own opinion?

A. And my own, in this opinion I say the political pressure upon Patriarch, the confinement of the Patriarch,

and so on, deprived the Patriarch of a true means of communication.

Q. All right: You say that is a permissible interpretation and that is more agreeable to your scheme of things, is that right?

A. Yes.

[fol. 242] Q. All right. Now this order of 1920 also says that all actions by the Karlovitz Synod——

Mr. Arkush: No, it says no such thing.

Q. (Continuing) —"all measures as may be taken in conformity with the present decisions must upon the reestablishment of the Central Highest Church Authority be submitted to the same for confirmation." That is the fact, is it not?

A. Yes.

Q. All right. And the Karlovitz Bishops never submitted to the Central Church Authority in Russia the confirmation of their acts, did they?

A. Never.

Q. They never did?

A. Never did.

Q. Isn't it a fact that Patriarch Tikhon by an order dated April 22, 1922, dissolved the Karlovitz Synod, declared their acts anti-canonical and prohibited them from functioning, yes or no?

A. Yes.

Q. And isn't it a fact that on November 10, 1923, a similar decree issued by Patriarch Tikhon gave the same orders and directions?

A. Probably yes. I don't remember the date, but it is the fact.

Q. You don't remember——

Mr. Arkush: I will concede——

Mr. Adler: No, no.

Q. You wrote a book called "The Russian Church Since The Revolution", did you not?

A. Yes, 20 years ago, so I don't remember all the dates in my book.

Q. Well, it wasn't an issue of a date, was it? It was an issue of substance, wasn't it?

A. Yes. I don't contradict. You are right in your substance.

[fol. 243] Q. Yes, but didn't you indicate there was some doubt about it?

Mr. Arkush: I object. We are wasting time. He doesn't remember the exact date. I am willing to concede the date. Why waste time on it?

Mr. Adler: It isn't an issue of dates. It is an issue of substance and my idea was that the witness was hedging about the validity of that order.

The Witness: I have acknowledged already.

Q. There is no doubt about it, is there?

A. In my mind.

Q. And didn't you so state in your book?

Mr. Arkush: Show him the book.

Q. Didn't you so state in your book, that there is no doubt about the validity of the order of the Patriarch of November 1923 dissolving that Karlovitz group?

A. You say "validity". It is a different question. It is a different problem, validity, or the fact of this issue. I——

Q. I am talking about the fact of the issuance.

A. The fact of the issuance, without doubt.

Q. Without doubt?

A. Yes.

Q. And isn't it a fact that these two orders of April 22, 1922, and November 10, 1923, recalled the order of November 20, 1920?

A. Yes.

Q. And subsequently in 1928, May 9, 1928, and on June 22nd, 1934, or thereabouts, subsequent orders by the Chief Church Authorities in Russia similarly affirmed these nullifying orders issued by Patriarch Tikhon, isn't that the fact?

A. I could not follow your dates. You mean Sergius?

[fol. 244] Q. Sergius.

A. Yes.

Q. So that at least on four occasions, Patriarch Tikhon on two occasions, and Patriarch Sergius on two other oc-

casions, declared the acts of the Karlovitz Bishops null and void and prohibited them from acting?

A. Yes, that is the fact.

Q. Notwithstanding that these Karlovitz Bishops carried on anyway, isn't that so?

A. What?

Q. Notwithstanding these prohibiting and nullifying orders, these Karlovitz Bishops carried on anyway?

A. Yes.

Q. When these Karlovitz Bishops organized their Synod—what year was it, by the way, that it was organized?

A. What?

Q. What year was that Karlovitz Synod organized?

A. What?

Q. What year? Was it around 1920 or 1921?

A. 1921.

Q. How many bishops were in that Synod?

A. How——

Q. How many bishops?

A. I don't remember. More than ten, between ten and——

Q. Weren't there only four?

Mr. Arkush: Do you want the fact?

Mr. Adler: No, I want what the witness knows.

A. No, I don't know. I think it is about ten or twelve.

Q. Very well. These Karlovitz Bishops established themselves in Yugoslavia, isn't that so?

A. Yes.

Q. And in the course of events when the Allies liberated Serbia, the Karlovitz group moved to Germany, did it not?

A. We have spoken about it.

Q. But they did move. I didn't ask you when. I said [fol. 245] they did move into Germany?

A. But after the fall of Germany. After the fall.

Q. You still insist it was after the fall of Germany, or are you guessing at that date?

A. I am guessing. I am not sure.

Q. You don't want to guess, do you, a historian like you doesn't want to guess on a material fact?

A. Certainly. I am not writing a book. I answer——

Q. You are giving testimony. Isn't that the equivalent of writing a book?

A. (No answer.)

Q. Anyway, they went to Germany, leaving the date open, isn't that so?

A. Some of them went to Germany, some of them to Switzerland and——

Q. But the Synod, the organization?

A. Yes, now it is in Germany, yes.

Q. And they left Yugoslavia and went into Germany in front of the liberating Allied Armies, didn't they?

A. In front?

Q. Before them. As the liberating Allies liberated Yugoslavia they went into Germany, isn't that the fact?

A. I don't know. Perhaps it is not the fact.

Q. You don't know. That is enough. Now isn't it a fact that during the Civil War in Russia, in 1920 and 1921 and 1922, these Karlovitz Bishops publicly favored the restoration of the Czar?

A. Not during the Civil War. It was——

Q. I can't hear you.

A. Yes, it was in Yugoslavia.

Q. "Yes", is enough.

A. 1921, yes.

Q. They publicly favored the restoration of the Czar?

A. Yes.

Q. Then when Hitler attacked Russia in 1941, these Karlovitz Bishops publicly announced their stand for Hit-
[fol. 246] ler, didn't they?

A. No, not publicly.

Q. But privately?

A. Some of them privately were compromised, yes.

Q. They played with Hitler?

A. Not they. Some of them.

Q. Some of the Synod?

A. Yes, some of the members of the Synod.

Q. And isn't it a fact that orders were given that in the churches under the jurisdiction of these Karlovitz Bishops that a prayer should be uttered for Hitler?

A. Should be what?

Q. I withdraw that question. Is it not one of the usages of the Orthodox Church, that in services, in prayers, a

prayer be issued for the welfare of the Chief Ecclesiastical Authorities of the Church and the Civil Authority too? Isn't that one of the practices?

A. You mean for the head of the Government? Yes, in every country.

Q. That is right. For example, in the United States the Orthodox Churches pray for the welfare of their Chief Authority?

A. President Truman.

Q. Excuse me. Wait a minute. In case of churches acknowledging the authority of the Patriarch of Moscow, they pray for the welfare of the Patriarch of Moscow, and the President of the United States, isn't that customary?

A. Yes.

Q. And during the lifetime of President Roosevelt they prayed for his welfare, isn't that so?

A. Yes.

Q. That is one of the customs and practices of the Church?

A. (Nodding yes.)

Q. Isn't it a fact that the churches, such as they were, under the authority of the Karlovitz Bishops prayed for the welfare of Hitler?

A. In Germany.

[fol. 247] Q. Yes or no.

A. In Germany, yes, but not in Switzerland.

Q. I am talking about Yugoslavia.

A. I don't know about Yugoslavia.

Q. You don't know that?

A. Probably for the head of the Serbian Government, not for Hitler.

Q. No, I am talking about Hitler.

A. No, I don't know.

Q. You don't know?

A. No.

Q. You wouldn't deny it, would you?

A. I wouldn't deny it because I don't know.

Q. I have before me a pastoral letter of Patriarch Sergius dated March 28, 1942, which appears in "The Truth About Religion in Russia," which you indicated you had read. Now I have this single sentence, "The European

Karlovatsk''—that is the same thing as Karlovitz, the one we are talking about?

A. Yes.

Q. "The European Karlovatsk separatists have completely entered Hitler's services. They pray for him in their churches." Is that——

A. If the sentence is true, it relates to the churches in Germany. I don't know.

Q. It doesn't purport to say Germany, does it?

A. He doesn't say either that it was Yugoslavia.

Q. Do you dispute the statement of the Patriarch?

A. Why not?

Q. Why not? I am asking you. Why do you?

A. I don't dispute. In this statement there is nothing said about Yugoslavia. It is not said that all the members of the Karlovitz——

The Court: This is all argumentative. Let us get to something concrete, please.

Mr. Adler: One more question on this and I will leave it. [fols. 248-249] The Witness: But it is all to nothing, because I disagree with politics of these Karlovitz bishops.

By Mr. Adler:

Q. Now I show you an article appearing in a magazine called "The Living Church" in the issue of April 27, 1947, entitled, "America——"

Mr. Arkush: Don't read from it because I am going to object.

Mr. Adler: I am not going to read.

Q. Entitled "Karlovitsi and Moscow,"

Mr. Arkush: Do you want that in evidence?

Mr. Adler: Just a portion of it.

Mr. Arkush: If anything goes in, put the whole thing in, to make speed.

Q. Written by Ralph Montgomery Arkush, the attorney for the plaintiff in this case, and I call your attention to this portion of the article——

Mr. Arkush: Let us get it in first

Mr. Adler: All right. I offer it in evidence.

(Received in evidence and marked Defendants' Exhibit H, consisting of pages 15 and 16.)

[fol. 250] By Mr. Adler:

Q. As I say, by the time of the end of this war, by 1947, that Karlovitz Synod had ceased to exist for practical purposes, isn't that the fact?

A. But there is a Synod in Germany now.

Q. It is a paper organization. They have no parishes, no jurisdiction, no churches, have they?

A. They have some parishes.

Q. How many?

A. I don't know.

Q. Two, three, four, no more than that?

A. Perhaps some dozens, because they have an organization in the Camps of D. P.'s in Germany.

[fol. 251] Q. In other words, they have some adherents in the displaced persons' camps?

A. Yes, mostly.

Q. But outside of those have they any other jurisdiction, this Karlovitz group?

A. There are some churches in France, in Italy, in Switzerland, and in this country too, but very few, relatively very few.

Mr. Arkush: South America, China, Japan.

Q. Well, didn't you say somewhere in writing that the Karlovitz Synod had ceased to exist?

A. I don't think so.

Q. You don't think so. All right. Now, let us turn to the United States. You are aware, are you not, that by a decree of August 16, 1933——

A. 16th?

Q. August 16th, 1933.

A. 1933?

Q. I don't hold you to the date. I have that date. You don't have to agree with me on the specific date. A decree was issued by the Supreme Church Authority in Russia under Patriarch Sergius declaring anti-canonical the declaration of autonomy of the group of American churches, declaring that to be a violation of the discipline of the

Church and putting Metropolitan Platon under prohibition from performing divine services?

A. I was not in America that time, did not read this document. I heard of it. So I am not a witness in this case. Probably you are right.

Q. But on the direct examination you were very free to testify as to a lot of things to which you were not a witness, but which you discovered in the course of your searches.

A. Yes, yes.

Mr. Arkush: Not, your Honor, as to the American Church.

[fol. 252] Q. As a historian, didn't you feel it your duty to acquaint yourself with documents relating to the subject of Russian Church history?

A. I did not write a book about American Church.

Q. You didn't?

A. No.

Q. Whether you wrote a book or not, didn't you familiarize yourself with the course of events of the Church in the United States?

A. Not in exact terms.

Q. But did you, in exact terms, become familiar with that document?

A. I heard of it.

Mr. Arkush: To save time, I will concede whatever is in the document. What is the use of badgering the witness about it? He wasn't produced here as a witness on the American Church.

The Court: It seems to me that nine-tenths of the evidence adduced so far on both sides is completely foreign to the issues in this case. I can't understand. After all, there is no jury in this case and you gentlemen seem to be proceeding on the theory that the political tincture of the respective factions has something to do with their right to occupy this Cathedral. I am sure that you are not soberly advancing the idea that because one faction may be Communist or anti-Communist, or one faction may be Fascist or anti-Fascist, it has anything to do with the right to occupy the Cathedral.

Mr. Arkush: I certainly haven't advanced any such idea.

The Court: I dare say 75% of the evidence has been directed towards that proposition.

[fol. 253] Mr. Arkush: Our endeavor was to show that the Patriarchal Church was cut off from communication with America and therefore we came under the jurisdiction of the ukase to declare our autonomy.

The Court: That was twenty years ago.

Mr. Adler: I will cut that short.

By Mr. Adler:

Q. After Bishop Theophilus succeeded Bishop Platon, you are aware, are you not, that the Patriarch issued a similar decree nullifying the action of the so-called autonomous group in the United States and declaring it anti-canonical, and I am referring to Defendants' Exhibit C.

Mr. Arkush: Now I object. He is going right back to the American Church. The witness was not produced to testify as to the American Church, and didn't testify as to the American Church.

The Court: Let him state that.

Q. Are you familiar with that document?

A. I heard it.

Q. In 1937 the so-called American Church placed itself under the jurisdiction and authority of the Karlovitz group, did it not?

A. No.

Q. The answer is no?

A. I cannot answer yes or no. It is——

Q. It is a mixture of yes and no, is it?

A. Yes, sir.

Q. How much of it is no?

Mr. Arkush: Let the witness answer.

Mr. Adler: All right.

The Witness: If you will let me answer.

[fol. 254] Q. Please explain, but try to be brief and accurate.

A. Metropolitan Theophilus, as well as some heads of these Church factions agreed in an official document to

organize a common Synod consisting of four Metropolitans, China, West Europe, Karlovitsi and America, Karlovitsi in the sense of the Yugoslavia and Balkan regions. So in this case Theophilus acceded to this organization as a member of it, but in practice I think he ruled autonomously in America. That is the point. When I disagree with my Metropolitan, I deeply regret the fact of his entering this organization, but he considered himself not as a subordinate, and we in America did not consider us as subordinate to this Synod.

Q. Before I forget it, what is the foundation or authority for the creation of the so-called Metropolitan District in the United States? Is it that same order of November 20, 1920?

Mr. Arkush: Same objection. He wasn't produced as a witness to that.

A. The American Church existed before it as a more or less——

Q. I know, but the autonomy didn't exist before 1924, did it?

A. In fact, it existed since the break of the communications with Russia. It existed——

Q. I am talking of the documentary authority, the alleged canonical authority for the organization of this independent district. Is that based on the order of November 20, 1920, or on something else?

A. What was it?

Q. 1920.

A. 1920, yes.

Q. In other words, the American group has the same foundation as the Yugoslavia group, isn't that so?

A. Yes, in the last instance, yes. There is a great dif- [fol. 255] ference, if you permit me to say, because American Church has its own Council. It is a national Church, not a Church of the emigres. It is a Church of American citizens.

Q. Did you ever state in writing that the American Church in joining the Yugoslav group had been "subjugated" to the Yugoslav group?

A. What "subjugated"?

Q. Did you ever state in writing that by joining the

Yugoslav group the Yugoslav group had "subjugated" the so-called American Metropolitan District?

A. I don't remember I have written it.

Q. Didn't you ever state in writing the following: "Subordinating ourselves to this Synod (referring to Yugoslavia) our Church in substance subordinated itself to a group of bishops who really have no jurisdiction themselves. Because of this some people are inclined to speak only of our cooperation with the Synod. This term 'cooperation', however, is not correct, because the acts of 1936-37 definitely subjugated our Church under the Synod Abroad." Did you ever make that statement?

A. As I was in a position——

Q. Yes or no, that is all, Professor. Did you make it?

A. I don't remember.

Q. That is enough.

A. I don't remember exact terms.

Q. That is enough. That is all.

A. What is the origin of this writing? I have written personally to Metropolitan Theophilus——

Q. You don't remember?

A. I don't remember the exact terms of my letter.

Q. Are you raising a point that you don't remember the exact terms, but didn't you ever state the substance of this that I have read?

[fol. 256] A. It was a danger of subordination. In practice, in fact, we don't feel that way about it.

Q. Isn't it a fact that by reason of this relationship with Yugoslavia bishops, so-called American bishops had to be confirmed by the Yugoslav Synod? Yes or no.

A. Probably yes. I think so.

Q. Why the doubt? Don't you know?

A. No, I don't know exactly. Probably yes.

Q. Probably yes. Isn't it a fact that before honors could be conferred on so-called American priests, you had to get the permission of the Yugoslav bishops?

Mr. Arkush: There is a written document that prescribes all that. It is right here in court and we can——

The Court: What is he, a history expert, or an expert on canonical law?

Mr. Adler: History.

The Court: Is he qualified to answer these questions?

Mr. Arkush: We didn't qualify him as a canonical expert. We deliberately refrained from doing so.

Q. Well, to your knowledge, isn't is the fact that the Bishop of Alaska, of this Metropolitan District, before he was confirmed, had to pledge loyalty to the Yugoslav Synod? To your knowledge, yes or no?

A. I don't know exactly. I heard about it.

Q. In 1947 the Metropolitan District here withdrew from the Yugoslav Synod, did it not?

A. When?

Q. In 1947 or 1946.

A. Yes. In the Cleveland convention.

[fol. 257] Q. So that the situation of the Metropolitan District, to summarize it, is that they declared their independence or autonomy of Moscow in 1924, in 1937 they joined Karlovitz, and in 1947 they withdrew from Karlovitz. That is in substance the fact, is it not?

A. Yes, more or less.

Q. Were you present at the convention of the Metropolitan District in 1946?

A. At Cleveland, yes, I was present.

Q. And did you in connection with others prepare a memorandum concerning the status of the Metropolitan District and the Church in Russia for that convention?

A. Yes, before this convention I signed a memorandum.

Q. You signed it. You were one of the authors of it?

A. Pardon?

Q. You were one of the authors of that memorandum, weren't you?

A. One of the authors.

Q. Now, I show you this translation and ask you whether that is not a translation of the memorandum that you signed and in part authored?

A. What do you wish me to read?

Q. Read the whole thing. It won't take more than a couple of minutes.

A. Just ten minutes. Give me the Russian text.

Q. You can read English, can't you?

A. Yes, but I cannot confirm the exactitude of the translation. What do you expect from me?

Mr. Arkush: If this is on canonical and not historical matter, I am going to object to it anyhow.

Mr. Adler: While the witness reads the Russian I would like your Honor to read the English because I think it is a basic document.

[fol. 258] The Court: I won't read it until it is in evidence. I am the trier of the facts.

Mr. Adler: Well, I offer it in evidence.

Mr. Arkush: Let me see it.

The Witness: Now I have finished.

By Mr. Adler:

Q. That is the memorandum that you signed and partly authored, is that right?

A. Yes.

Q. And you submitted that to the convention of 1946?

A. Not officially. We have published it in newspapers.

Q. Well, didn't you submit it to the chief authorities of this Metropolitan District?

A. No, it was a private letter. I was not a member of the Sobor.

Q. I didn't ask you that. After you wrote that you didn't put it in your pocket, did you? You gave it to somebody?

A. We have sent it to some bishops, to Metropolitan, and to newspapers.

Q. That is right, for consideration at the convention?

A. Yes. It was not read at the convention itself, but it doesn't matter.

Q. But you submitted it to the Metropolitan and his associates?

A. Yes.

Q. The chiefs of that convention?

A. Yes.

Q. And isn't it a fact that the resolution that was adopted at that convention in 1946 was in part based upon this memorandum?

A. I hope so, yes.

Q. Well, haven't you read that resolution?

A. Yes, I hope so, that we have influenced. We were not——

Q. Isn't the language almost identical with this memorandum?

A. It is not identical, but I think substantially it is the same.

[fol. 259] Mr. Arkush: Your Honor, I have no objection to this going in evidence with the understanding that before the final submission of the case the accuracy of the translation may be checked.

The Court: All right. It will be received.

Mr. Adler: I wonder, your Honor, if you could take five minutes to read it, because it clarifies a lot of points in my opinion. I wouldn't ask you to do that unless I genuinely felt so.

(The document was handed to the Court.)

The Court: This has all been said a long time ago.

Mr. Adler: I know, but it crystallizes the whole thing.

(Received in evidence and marked Defendants' Exhibit I.)

By Mr. Adler:

Q. Recently, within the early part of this year, there was a split in this Metropolitan District, was there not?

A. When?

Q. Recently, in early 1947 or late 1946?

A. What do you mean by a split?

Q. Well, didn't four bishops and their parishes withdraw from the Theophilus organization?

A. Yes.

Q. And organize their own organization?

A. Yes.

Mr. Adler: That is all.

Re-direct examination.

By Mr. Arkush:

Q. Professor Fedotov, you made some reference in your cross-examination to the Synodal Church. That is the [fol. 260] same thing as the Renovated Church, is it not?

A. Yes. After Sobor of 1923 they changed the name.

Q. When you said in response to Mr. Adler's question

that the decrees of the acting locum tenens Sergius recalled or revoked the 1920 Ukase of Patriarch Tikhon, you meant only as to the Karlovitsi Synod, didn't you?

A. I am sorry?

Q. You referred only to the Karlovitsi Synod?

A. (No answer.)

Q. You testified in effect that later decrees of the Patriarchal office revoked or recalled the 1920 Ukase. You didn't mean that they revoked the effect of that Ukase as to any other organization except the Karlovitsi Synod, did you?

A. Yes.

Q. It didn't revoke it as to any other?

A. Only to the Karlovitsi Synod, not all churches abroad.

Q. The word "Karlovatsk" as used in the publication of the Patriarchal Church known as "The Truth About Religion" could refer to people adhering to the Karlovitsi Synod in any part of the world, couldn't it, the expression "Karlovatsk"?

A. I don't know. It is a matter of interpretation.

Q. It could refer to people adhering to the Karlovitsi Synod in any part of the World?

A. It can be, yes.

Mr. Arkush: Now, your Honor, I offer in evidence the documents known as Plaintiff's Exhibits 11 and 12 in the case of Kedrovsky against Rojdesvensky. They are a short extract from the minutes of the Synod, not Sobor, the Synod of the Renovated Church, and the diploma or credentials of Kedrovsky, on which the Appellate Division awarded him possession of the Cathedral. I want to make absolutely sure, without any question, that those papers [fol. 261] emanated from the Renovated and not from the Patriarchal Church.

Mr. Adler: I object to these. I don't see the materiality of it.

The Court: Is your objection based on materiality?

Mr, Adler: Yes.

The Court: Overruled. They will be received.

(Plaintiff's Exhibits 18, and 18-A for Identification, received in evidence and marked Plaintiff's Exhibits 18 and 18-A.)

By Mr. Arkush:

Q. Now, Professor Fedotov, I show you Plaintiff's Exhibit 18 and ask you who was the man referred to in that exhibit as Chairman Metropolitan Evdokim?

A. I think it is a member, a presiding member, of the Synodal Church at the time.

Q. The Renovated Church?

A. Yes.

[fol. 262] (Received in evidence and marked Plaintiff's Exhibit 19.)

By Mr. Arkush:

Q. I am showing you the names which appear at the end of Plaintiff's Exhibit 19, and I ask you who these people were that signed that document?

[fol. 263] A. Barnabas is the Patriarch of the Serbian Church. Patriarch Eulogius was the head of the Western European Church, Russian Church in Exile. Metropolitan Theophilus, the head of the American Church. Metropolitan Anastasius the head of the Balkan or Southern European Church which——

Q. It is referred to in the Constitution as the Near East.

A. (Continuing) Which before was called the Karlovitsi.

Q. Is that the same as the Near East referred to in Article 4, Section 1 of the exhibits?

A. Yes; Near East.

Q. What happened in the case of the Western Diocese? Did the clergy and laity confirm?

A. Very soon, after some months, after this agreement, Metropolitan Eulogius separated himself from this common jurisdiction and went under the jurisdiction of Ecumenical Patriarch of Constantinople.

Q. And is that where a majority of the Western European parishes are today?

A. Yes, they are.

Q. So that the Synod from the time of the separation of the Western Diocese consisted simply of three Metropolitans, Far East, Near East, and North America?

A. Yes.

Q. And of those Districts the North American was

much more the populous, wasn't it? It had many more parishes?

A. Certainly.

Mr. Arkush: That is all.

Re-cross-examination.

By Mr. Adler:

Q. Just one or two questions. I show you a document and ask you whether you ever saw this before?

A. No, I did not see, but I heard.

[fol. 264] Q. You heard about it?

A. Yes.

Q. In your memorandum, Defendants' Exhibit I, you refer to the matter of the demand concerning loyalty to the Soviet Government. Do you recall that reference?

A. Yes.

Q. When you made that statement, did you base it on any documentary—please note what I say—evidence as to demand for loyalty to the Soviet Government?

A. What do you mean by that?

Q. You know what I mean by a document, don't you?

A. Now I personally——

Q. Excuse me. I beg your pardon.

A. (Continuing) —did not receive the document.

Q. Professor, I beg of you, you must answer my questions, and specifically. Don't go beyond the specific requirements of the question. You know what I mean by a document, don't you, yes or no?

A. I refuse. It is insulting.

Q. Well, precisely.

A. It is insulting.

Q. Now I ask you whether the statement you made in Defendants' Exhibit I as to the alleged requirements concerning loyalty to the Soviet Government was based upon any document?

A. In last instance, that.

Q. Is the answer yes?

A. Yes.

Q. What document? Have you got that document?

A. I did not read the original of this document but my

bishops, my priests, whom I know, received such a document, Ukase.

Q. Have you got that document? Do you have the document here?

A. Yes.

Q. Are you referring to the Ukase of February 16, 1945, by the Patriarch Sergius?

A. No, 1927.

Q. You are not referring to this document?

A. No, 1927.

[fol. 265] Q. So far the only document in evidence relating to the subject is Defendants' Exhibit D, which is the Ukase of February 16, 1945, wherein the Patriarch stated to the American delegation that went to the Sobor in Russia in 1945, that one of his wishes was that, "In the name of the American Orthodox Church declares its abstention from political activities against the U.S.S.R. and gives corresponding orders about this to all the Parishes?"

A. It is quite different. It is a different document.

Q. You wouldn't say that that language justifies a statement that there was a demand for loyalty to the Soviet Government, would you?

A. No, it is different. This demand was given up by the Patriarch at that time.

Q. But you haven't any document, this alleged document?

A. Not in my pocket.

Mr. Adler: All right. That is all.

Mr. Arkush: That is all.

(Witness excused.)

Joseph Pishtey, residing at 46 Seymour Street, Yonkers, New York, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Kilroe:

Q. Father, you are a duly ordained priest in the Russian Orthodox Church of North America?

A. Yes, I am.

Q. What is your official connection with that Church?

A. I am Pastor of the Holy Trinity Russian Orthodox Church of Yonkers, New York, and Treasurer of the Met- [fol. 266] ropolitan Council of the Russian Orthodox Church of North America.

Q. That was the group that recognized Metropolitan Theophilus?

A. That is right, sir.

Q. Could you tell the Court how many parishes you have in your group of churches?

A. According to our records we have two hundred churches in the United States, forty in Canada and nine in Alaska.

Q. Do you know how many churches there are in the so-called Benjamin group, the Metropolitan Benjamin group?

A. No, I do not. I can't hazard a guess, Whatever I would say would be guessing.

Q. Well, could you give us an approximation of how many churches, parishes, are connected——

Mr. Adler: The witness said he doesn't know.

The Court: Sustained.

Mr. Adler: Also may I, perhaps a little tardily, note that I object to the testimony elicited on the ground of immateriality.

The Court: Sustained. Strike it out.

Mr. Kilroe: Just one other question.

Q. Father, do you know where Metropolitan Theophilus is now?

A. Yes, I do. He is in San Francisco.

Q. What is his physical condition at this time?

A. I visited the Metropolitan at San Joseph's——

Q. No, just tell what his physical condition is?

A. Considered very grave.

Mr. Adler: If you say he is ill, I will accept that statement.

Mr. Kilroe: That is all.

(Witness excused.)

[fol. 267] COLLOQUY

Mr. Kilroe: That is the plaintiff's case.

Mr. Adler: Before you actually rest I wonder if we can make the following stipulation: I think you will stipulate that the plaintiff paid nothing for the deed it got from Mr. Oustinoff?

Mr. Arkush: Yes.

Mr. Adler: I think you will agree that since its incorporation in 1925 the plaintiff did not assert any right to possession and did not make any effort to obtain possession of the Cathedral until April 9, 1945, when this suit was brought?

Mr. Arkush: Well, I will stipulate that the plaintiff took no step to eject the occupants of the Cathedral, namely, John Kedrovsky and Nicholas Kedroff, and John Kedroff, until this suit was brought.

(Colloquy)

Mr. Arkush: I would also like to have at that point a stipulation from Mr. Adler that the present defendant, Metropolitan Benjamin, took no steps to assert his alleged right to possession of the Cathedral.

Mr. Adler: I will agree.

Mr. Arkush: Up to the time he sued John Kedroff in the fall of 1945.

Mr. Adler: I agree.

Mr. Arkush: If there is any question of laches it works both ways.

(Colloquy)

I don't think there is any laches in the case.

Mr. Adler: I think you will agree too that the object of this suit is to place Metropolitan Theophilus in the [fol. 268] possession of the Cathedral as alleged Archbishop, isn't that so?

Mr. Arkush: The object of the suit is to eject the defendants.

Mr. Adler: There is no stipulation on that last point?

Mr. Arkush: No.

Mr. Adler: Very well.

The Court: Does the plaintiff rest?

Mr. Kilroe: Yes.

Mr. Adler: Your Honor, I want to make a motion and I will state my grounds very briefly.

I move to dismiss the case for failure to make out a cause of action on the following grounds: There is no cause of action for ejectment made out because to do so the fundamental ingredients are not merely title but possession, the right to possession, and an ouster, forcible or otherwise, of the plaintiffs. All that the plaintiffs have proved here is a paper title. They have not established any possession by them at any time. They did not establish that they have been ousted out of possession at any time, and they have not proved a right of re-entry. Consequently, as a matter of proof, relating to the nature of the action, namely, ejectment, the plaintiff has failed to make out a case.

The second ground is that the plaintiff at most has shown a paper title and holds this title as custodian or trustee for the duly accredited Archbishop appointed by [fol. 269] the Supreme Church Authorities in Russia. And the Kedrovsky case has held that such duly accredited Archbishop appointed by said Authorities is the only person who has the right to possess, occupy, and use that Cathedral. The plaintiff corporation holding the title in trust for such purpose is in the anomalous position of trying to eject from the building the beneficiary of the trust.

The third ground is that the action is barred by the Statute of Limitations and laches.

The Court: Motion denied.

Mr. Adler: Exception.

May the record also show that before I made the motion I moved to strike from the record the testimony of the witness, Professor Fedotov, given on direct, on the ground that most of it was hearsay, it was incompetent, and irrelevant to the case.

The Court: After the conclusion of the trial, in your memorandum, you may specify by relation to folios in the minutes just what portion you claim is inadmissible and I will take it under advisement then. Part of it no doubt should be stricken.

Mr. Adler: I want to add one more ground to the motion to dismiss, if I may.

The Court: As far as I am concerned, as I stated before, nine-tenths of the evidence in this case is immaterial. There is a sufficient basis in the documents and most of the testimony and argumentation concerning the documents would more properly be the function of counsel's briefs.

[fol. 270] Mr. Adler: May I add one other ground to the motion to dismiss, namely, that the alleged justification, because of alleged political conditions in Russia, for the purported declaration of autonomy of this so-called Metropolitan District is wholly unwarranted in fact and in law, and even if they felt themselves justified in their own conscience that they had to leave, they could not take with them the property which heretofore had been administered by the Supreme Church Authority in Russia.

The Court: They have two arrows in their quiver. One is canonical and one is the statutory law of the State of New York. I will take it all under consideration.

DEFENDANTS' EVIDENCE

Mr. Adler: Metropolitan Gregory.

Mr. Kilroe: If the Court pleases, to facilitate the trial of this action, if the attorney for the defendants will tell us what he hopes to prove through Metropolitan Gregory we may be able to stipulate that he would testify to the facts he hopes to adduce.

Mr. Adler: I think that is a sensible suggestion.

I expect him to testify to the following, and after you have read that, plus a few more points, and if you agree as to those, maybe we can agree as to the balance.

[fol. 271] METROPOLITAN GREGORY TCHUKOV, residing at the Hotel Westbury, New York, N. Y., called as a witness on behalf of the defendants, was duly sworn.

(Discussion ensued off the record.)

Mr. Kilroe: We will agree to this stipulation.

Q. Mr. Adler: Your Honor, it is stipulated that in lieu of the testimony of his Grace, Metropolitan Gregory, who is on the witness stand——

Mr. Kilroe: No, if he were called——

Mr. Adler: That having been called as a witness——

The Court: Having been called as a witness, if he proceeded to testify he would testify to the following, without conceding the actuality of the testimony.

Mr. Kilroe: That is correct, your Honor.

Mr. Adler: Maybe I don't think they would go so far. Maybe they would concede it, wouldn't question it.

Mr. Kilroe: No, we won't concede the testimony of anyone.

Mr. Adler: All right.

The Court: In other words, you think they might concede that the testimony is the fact?

Mr. Kilroe: That isn't true.

The Court: That is all right with me.

Mr. Arkush: No, your Honor.

Mr. Adler: 1. I am a Metropolitan and Archbishop of the Russian Orthodox Church and I am a permanent member of the Holy Synod which, together with the Patriarch, is the Supreme Church Authority of the Russian Orthodox Church.

[fol. 272] 2. By reason of my studies in theological academies, my work in the Russian Church for about fifty years, and the official positions therein I have held, I am familiar with the canons, rules, and usages of the Russian Orthodox Church and the condition of the Church in Russia during the last fifty years.

3. The Enactments of the Sobor of 1917-18 have been since their adoption and now are binding upon the entire body of the Russian Church including all dioceses and sub-divisions thereof.

4. One of the Enactments of this Sobor provided that the Patriarch and the Holy Synod, of which he is the head, were to be the Supreme Church Authority of the Russian Church and since 1917 said Patriarch and Holy Synod have been and now are such Supreme Authority of the Russian Church.

5. Shortly after 1918, various movements in the Russian Church, known as the Living Church, the Church of Ressur-ection, and so forth, were initialed, and under the auspices of these Churches a Sobor was held in 1923. This Sobor is not regarded as having met with canonical re-

quirements because it was not called by the Patriarch and the Holy Synod. However, within a few years thereafter these Church movements subsided and practically all of the leaders, adherents and parishes of this Church joined with and were absorbed by the Patriarchal Church.

We do not claim that the convocation of the Sobor of 1923 was due to any force or violence or any intervention [fol. 273] by the civil authorities, our position being merely that we do not regard it as canonical, because it was not called by due procedure according to the constitution of the Church, namely, by the Patriarch and his Holy Synod.

6. The Sobor of 1917 elected Tikhon as Patriarch. He died in 1925. With relation to his alleged arrest, I do not believe that he actually was imprisoned, but for a short period he was confined to his quarters and about 1923 he was given full liberty and thereafter acted as Patriarch. After Tikhon's death in 1925, Metropolitan Peter was elected temporary locum tenens and in December 1925 Sergius became temporary locum tenens, with full powers of the Patriarch, and thereafter, in 1943, at a local Russian Sobor he became Patriarch. And at the Sobor of 1945, Sergius having died in 1944, Alexii was elected Patriarch, and he is the Patriarch today, and I am a permanent member of his Holy Synod.

7. The Archdiocese of North America and the Aleutian Islands is a diocese of the Russian Orthodox Church and is ruled by an Archbishop appointed by the Supreme Church Authority of the Russian Church which may suspend or remove such Archbishop and appoint another in his place at its pleasure.

8. Saint Nicholas Cathedral in the City of New York, was acquired about 1900 and the official records in the Archives of the Russian Church in Moscow disclose that the Russian Church in Russia and the Russian Government contributed a sum in excess of $150,000.00 for the acquisition of the Cathedral, and up to 1917 these bodies con- [fol. 274] tributed additional sums for the maintenance of said Cathedral.

9. Saint Nicholas Cathedral, in accordance with the rules and usages of the Russian Orthodox Church, must be possessed, occupied, and used by the Archbishop of the

American Archdiocese, who is duly appointed by the Supreme Church Authority, above referred to, namely, the Patriarch and the Holy Synod, and said Cathedral may not be occupied by any other official or person.

10. Canon law and the rules and usages of the Russian Orthodox Church do not permit any diocese or other subdivision or constituent part of the Church for any reason whatsoever to secede from or declare itself independent of the main body of the Church at large or declare itself autonomous or a self-governing body or district.

11. The action of the group of Russian Orthodox churches in America and the resolutions adopted by them in the convention or local Sobor in Detroit of 1924, and the purported election of Archbishop Platon Rojdesvensky as the Archbishop of said Churches violates the canons, rules, and usages of the Russian Orthodox Church and are null and void.

12. By reason of such conduct of the aforesaid Platon, the Supreme Church Authority suspended said Platon in 1924 and by a decree in 1933 the Supreme Church Authority declared, (1) that the proclamation of the North American Diocese as autonomous was in opposition to the will and without the consent of the Moscow Patriarchate.

[fol. 275] Mr. Arkush: Just a minute. Are you quoting from a document that is in evidence?

Mr. Adler: Yes, that is in evidence?

Mr. Arkush: All right.

Mr. Adler: (Continuing) And was an act violating Church discipline and the law of the Church; (2) that the religious group organized around Metropolitan Platon was declared schismatic; that this organization was declared illegal, and all their decisions and acts appointing bishops and other clergy are illegal and invalid; (3) Metropolitan Platon, because of such conduct, was summoned to a Court of Bishops for violating the canons and the laws of the Church and in the meantime Metropolitan Platon was placed under prohibition from performing divine services or any other ecclesistical acts.

13. The action of said group of Russian Orthodox churches in America in the convention or Sobor of 1934, purporting to appoint Theophilus as successor to Archbishop Platon and as Archbishop of said group of

Churches, and the resolutions passed at said Sobor, and the actions and resolutions at the subsequent Sobors of said group of Churches are likewise violative of the canons, rules and usages of the Russian Orthodox Church and are null and void.

14. In 1935 the Supreme Church Authority in Russia issued a decree suspending Metropolitan Theophilus and the clergymen associated with him in the alleged Metropolitan District and placed upon him a prohibition like that which had previously been placed upon Archbishop Platon for similar conduct.

[fol. 276] 15. By reason of the actions of Archbishops Platon and Theophilus aforesaid, they and their adherents have been and now are under suspension by decision of the Patriarch and his Holy Synod.

16. Metropolitan Benjamin was appointed by the Patriarch and the Holy Synod as Exarch and temporary Archbishop of the North American Archdiocese in 1933, and in 1934 he was duly appointed by the said Patriarch and Holy Synod as Ruling Archbishop of said North American Archdiocese and, as such Archbishop, is entitled, under the rules of the Russian Orthodox Church, to possess, occupy and use Saint Nicholas Cathedral as his residence, as a place of worship, and as the episcopal seat of the said Archdiocese.

17. That the order of November 1920, issued by Patriarch Tikhon, was of a temporary nature and was limited in time to such period as communications between the Patriarch and the bishops outside of Russia were unavailable; that upon the restoration of communications the effect of the order would cease, and in any event, any acts taken pursuant to said order were subject to confirmation of the Supreme Church Authorities. By successive decrees, in 1922 and 1923, Patriarch Tikhon declared dissolved this group of Bishops known as the Karlovitz Synod, declared their acts void and illegal, withdrew the authority of the order of November, 1920, and forbade these bishops from further conduct. This ruling was subsequently affirmed by decrees of 1928 and 1934 by Metropolitan Sergius, and this group of Karlovitz Bishops have no canonical standing whatsoever and all their acts since [fol. 277] 1922 are wholly and entirely invalid.

18. With respect to conditions of the Church in Russia, after the Revolution, the Church in Russia was separated from the State and as a consequence there was a renewed activity of Church life. Churches were opened for worship and the churches were well and fully attended throughout the period following 1917, and, in fact, to my observation, there was greater Church activity following the Revolution than had existed before. For a short period, there was punishment of some clergymen, not because they were clergymen, but because these clergymen in most cases were engaged in acts of opposition in the Civil War to the Revolutionary authorities.

The action of the Sobor of 1923 had little effect upon the Patriarchal Church. The resolutions passed by it shortly became a dead letter and the——

The Court: Do you contend that this should influence my decision here? Unfortunately we got sucked into all this immaterial matter.

Mr. Adler: That is right.

The Court: I was giving you gentlemen your heads for awhile.

Mr. Adler: I think that is the danger of it. I am trying to counteract anything this Professor said.

The Court: That is why I am acting abruptly today or we would be going on for three more days. I don't see the materiality of this, but go ahead.

Mr. Adler: I promise I will not take more than three minutes.

[fols. 278-279] That the constitutent parties of the Sobor of 1923 shortly died out and the Patriarchal Church functioned effectively and without restraint. In the years following, from 1925 to date, the Church has received greater liberty and is functioning freely as an Orthodox Church, without interference by the civil authorities, and the political views held by the authorities, and any atheistic sentiment that they may have in no way interferes with the unhampered activities of the Russian Orthodox Church.

Counsel asked me to stipulate that there was never a Church trial of Metropolitan Theophilus, and I will state the fact that, as far as I know there never was a trial. Whose fault it was is another matter.

Mr. Kilroe: No cross-examination.

(Witness excused.)

Mr. Adler: Defendants rest.

The Court: Before you rest——

(Discussion ensued off the record.)

The Court: I will reinstate the testimony of Father Pishtey and allow you to cross-examine him if you want to.

Mr. Adler: I don't want to. His testimony simply was that there were 200 Churches in America, 40 in Canada and 9 in Alaska.

The Court: Are you resting?

Mr. Adler: With one motion.

Mr. Arkush: May that go on the record? It is stipulated that upon the withdrawal from the Metropolitan District of Archbishop Vitaly and three other bishops mentioned in the evidence, only three Parishes followed from the Metropolitan District.

[fol. 280] Mr. Kilroe: As I understand the law, your Honor—I may be wrong—I have four Soviet statutes I wanted you to take judicial notice of.

Mr. Adler: Soviet statutes?

Mr. Kilroe: Yes, pertaining to church property, which I think is competent under the second theory and I believe I will just cite those in the record without reading them and later on we can submit them, and we will give you a copy of them.

Mr. Adler: Well, put it this way: You offer them, I object to them, and then the Judge will reserve decision.

The Court: Put it this way: You are asking me to take judicial notice of four Soviet statutes which you are going to set forth in your memorandum?

Mr. Kilroe: That is right, your Honor.

The Court: That is all. I am not ruling on it.

Mr. Adler: All right. That is a way out.

The Court: Just cite them for the record.

Mr. Kilroe: One of them is decree of January 23, 1918, Sections 12 and 13 of that decree, Law of April 8, 1929, Section 25 of that; and instructions 2 and 3 of Law of April 8, 1929, Section 114 (3a). Also the Law of April 8, 1929, RSFSR Laws (1929), (Item 353).

[fol. 281] PLAINTIFF'S EXHIBIT 1.

CHAPTER 463

AN ACT to incorporate Saint Nicholas Cathedral of the Russian Orthodox Church of North America

Became a law April 8, 1925, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Platon Th. Rozdestvensky, Benjamin G. Basalyga, John N. Telep, Serge A. Ughet, Valerian E. Greaves, Theodore N. Brevern, Simon A. Bolan, Victor J. Stalevsky and Alexander J. Makarevich and their successors, who shall be appointed or elected as hereinafter prescribed, are hereby created a body politic and corporate under the name and style of Saint Nicholas Cathedral of the Russian Orthodox Church in North America, and by that name shall have perpetual succession and be capable of suing and being sued, and of acquiring, taking and holding in trust or otherwise, by purchase, gift, grant, devise or bequest (subject, however, to all provisions of law relating to devises or bequests by last will and testament) all and any estate or property real or personal necessary or proper for all or any of the objects or purposes of the said corporation, and to sell, convey or otherwise dispose of the same; and the said corporation shall have all the powers, and be subject to the provisions, so far as they may be applicable and not inconsistent with this act, of sections ten, eleven, twelve, thirteen and fourteen of the general corporation law.

[fol. 282] § 2. The object and purpose of the said corporation shall be the acquiring, maintaining and management of a cathedral church and its appurtenances in the city of New York as a central place of worship of the Russian Orthodox Church in North America, in accordance with the doctrine, discipline and worship of the Holy Apostolic Catholic Church of Eastern Confession as taught by the holy scriptures, holy tradition, seven oecumenical councils and holy fathers of that church; together with the

residence of the ruling archbishop of the Russian Orthodox Church in North America, and such incidental cathedral foundations, schools, faculties and other religious, charitable and educational work as may be properly connected therewith in and for the said Russian Orthodox Church in North America.

§ 3. The persons named in the first section of this act, shall be and are hereby constituted the first trustees of the said corporation, and they shall hold office and have power to fill vacancies in their own number, until their successors shall be appointed or elected, under the constitution to be adopted as hereinafter prescribed; provided, however, that the ruling archbishop of the said Russian Orthodox Church in North America, exercising jurisdiction as such, for the time being, shall always be ex-officio a member and trustee and the official head and presiding officer of the said corporation.

§ 4. The said corporation shall have power to adopt a constitution, prescribing the number of trustees, in addition to the said archbishop, of whom at least five shall be [fol. 283] laymen, and the mode of appointing or electing the said trustees; and to amend such constitution in the mode it shall prescribe for its amendment; and the said corporation shall also have power to enact statutes or by-laws not inconsistent with such constitution, for the government, regulation and management of the said corporation, its officers, business, property and affairs, and the same from time to time to amend, repeal or modify; provided, however, that such constitution, statutes and by-laws, shall not be inconsistent with this act, or with any law of the state.

§ 5. The access to said cathedral for worship shall always be free for all worshippers.

§ 6. The religious corporation known under the name of Russian Orthodox Saint Nicholas Church in New York organized and existing under the religious corporation law of the state of New York or any other religious corporation holding or claiming any interest in any real or personal property shall be and is hereby authorized, by its trustees or trustee for a nominal or other consideration to sell, convey, assign and transfer to the Saint Nicholas Cathedral of the Russian Orthodox Church in North

America any or all of the real or personal estate of the said Russian Orthodox Saint Nicholas Church in New York or other such corporation.

§ 7. This act shall take effect immediately.

[fol. 284] PLAINTIFF'S EXHIBIT 3

Minutes

of the first meeting of the Trustees of the St. Nicholas Cathedral of the Russian Orthodox Church in North America, held on April 23rd, 1925, at the premises of the Rectory of the St. Nicholas Cathedral, 15 East 97th Street, City of New York.

There were present: President of the Corporation: Most Eminent Metropolitan Platon Rozdestvensky.

Trustees: V. Rev. Archimandrite Veniamin Basalyga, Rev. John Telep, Hon. Serge A. Ughet, Mr. Valerian E. Greaves, Mr. Theodore N. Brevern, Mr. Simon A. Bolan, Mr. Victor J. Stalevsky, Mr. Alexander J. Makarevich.

There were also present: The Dean of the Cathedral V. Rev. Leonid Turkevich and Mr. G. G. Kisevalter.

The meeting was opened at 9:30 p. m. by a prayer "Christ is risen" sung by all present.

After having stated the reasons and purposes of the incorporation of the St. Nicholas Cathedral and expressed his profound satisfaction that the Cathedral thereby will forever be preserved safe as a central place of worship of [fol. 285] the whole Russian Orthodox Church in North America and seat of the Church Administration in this country, the President requested Mr. Greaves to act as secretary of this meeting and first to read to the Board an Act to incorporate St. Nicholas Cathedral of the Russian Orthodox Church in North America, approved by the Governor of the State of New York on the 8th day of April, 1925.

Thereupon the secretary read the said act and reported to the meeting that it was possible to have this act passed by the Legislature and approved by the Governor only because Mr. George Zabriskie kindly consented to help His Eminence in preparing the draft of said Act and

through his personal influence interested several Assemblymen and Senators in its passage. Without Mr. Zabriskie's assistance not only it would take much longer time to have this statute enacted, but it is doubtful that it would be possible to have the Act passed at all.

Upon motion duly made, seconded and carried, it was unanimously

Resolved: that a copy of the act to incorporate the St. Nicholas Cathedral of the Russian Orthdox Church in North America be prefixed to the minutes of this meeting, and that His Eminence Metropolitan Platon be requested to convey to Mr. Zabriskie the profound gratitude of the Board for his most valuable assistance in organizing the corporation and an unforgettable service rendered thereby to the Russian Orthodox Church in this country.

Thereupon Mr. Greaves stated that on April 17th, 1925, Hon. Michael M. Oustinoff as Trustee of the Russian Orthodox St. Nicholas Church in the City of New York, pur-[fol. 286] suant to the provision of the said Act, conveyed to the St. Nicholas Cathedral of the Russian Orthodox Church in North America the premises of the Cathedral and Rectory, and that the deed executed by Mr. Oustinoff to this purpose is now being recorded.

Upon motion duly made, seconded and carried, it was unanimously

Resolved: that notice be taken of the said conveyance, and that the warmest thanks of the Board be expressed to Mr. Oustinoff for his constant and unwavering protection of the interests of the Cathedral in the capacity of its Trustee, which was especially valuable during the trouble and insidious persecutions which our Church was recently living through.

Then the Secretary submitted to the meeting a draft of Constitution of the Corporation providing for the composition of the Board of Trustees of the Corporation and mode of their appointment and election.

The draft was read by articles and after deliberation the following text was unanimously adopted as the fundamental constitution of the Corporation.

Constitution

In the Name of the Father, of the Son and of the Holy Ghost.

In the exercise of the powers vested in us by an Act of Legislature of the State of New York entitled "An Act to Incorporate St. Nicholas Cathedral of the Russian Orthodox Church in North America", approved by the Governor of the State of New York on the 8th day of April, [fols. 287-289] 1925, and in full realization of our sacred duty to protect the interests of the Russian Orthodox Church, to preserve her unity, and secure forever her welfare in this country, we, the Trustees of St. Nicholas Cathedral of the Russian Orthodox Church in North America, do hereby set forth and ordain the following Constitution providing, however, that nothing therein shall be construed as a surrender by the Board of Trustees of any part of the final authority and responsibility solemnly imposed upon them by the Charter for maintenance and management of the Cathedral and its appurtenances in accordance with the doctrine, discipline, and worship of the Holy Apostolic Catholic Church of Eastern Nations, as taught by the Holy Scriptures, Holy Tradition, the Seven Oecumenical Councils and Holy Fathers of that Church.

[fol. 290] At the meetings of the Board of Trustees, whether regular or special, nine members shall constitute a quorum.

In the absence of a different provision in the constitution or statutes all questions shall be decided by simple majority vote of the Trustees present at the meeting.

Article 5. The Board of Trustees shall each year elect from their own number at the Annual Meeting a Secretary and Treasurer, the Secretary to have custody of the Seal and of the records of the corporation, the Treasurer to receive, husband, and disburse the funds of the same. In case of vacancy arising during the current year in the office of the Secretary or Treasurer, the Board of Trustees shall elect a person to fill such a vacancy, to hold office until the next Annual Election.

Article 6. The fiscal year of the corporation shall begin on the first day of September in each year. The Secretary and Treasurer shall prepare complete reports of the con-

dition and operations of the corporation for the past fiscal year and submit it to the next Annual Meeting of the Board of Trustees.

The Trustees and Officers of the corporation shall receive no salary or other compensation for their work.

Article 7. Amendments to this Constitution may be made by the Board of Trustees upon motion duly seconded by two-thirds vote of all the members of the Board provided [fol. 291] that a two months' written notice of the proposed amendment shall have been given to each Trustee.

After deliberation and upon motion duly made, seconded and carried, it was unanimously

Resolved: that detailed draft of the statutes of the Corporation shall be prepaired and submitted to the next regular meeting of the Trustees to be held on the first Wednesday in the month of June, 1925 and

that a committee be appointed for drafting said statutes cinsisting of V. Rev. L. Turkevich and Messrs. V. E. Greaves, M. M. Karpovich and G. G. Kisevalter, and

that said statutes shall provide that the Ruling Archbishop of the Russian Orthodox Church in North America, who at this time is His Eminence, Metropolitan Platon, duly appointed to this office by His Holiness, the late Patriarch Tikhon, shall have the right to nominate the dean and other clergy and servants of the Cathedral; and use the Cathedral at his discretion for all Episcopal acts and for other religious, benevolent and educational purposes, and have the general and unrestricted direction of the re- [fols. 292-293] ligious services in the Cathedral, and to use the building known as the rectory adjoining the Cathedral as his personal residence, and that it shall be lawful for the Archbishop through the Dean of the Cathedral, or any other person to be designated by him, to organize a parish at the Cathedral consisting of the Communicants worshipping at the Cathedral Church and

that these two last provisions shall take effect immediately.

[fol. 294] PLAINTIFF'S EXHIBIT 4

SUPREME COURT, NEW YORK COUNTY

JOHN S. KEDROVSKY, as delegate of the Holy Synod of the Russian Orthodox Greek Catholic Church, and as Archbishop of the diocese of North America and the Aleutian Islands of said church, and Archbishop and Consistory of the Russian Orthodox Greek Catholic Church, *Plaintiffs*,

against

PLATON ROJDESVENSKY and LEONID TURKEVICH, *Defendants*

The defendants above named having appealed to the Appellate Division of the Supreme Court for the First Department from the judgment entered herein on January 19th, 1925, in the office of the clerk of the County of New York, and said appeal having been argued and said Appellate Division having by an order dated the 27th day of November, 1925, and entered in the office of the Clerk of the Appellate Division of the Supreme Court, First Department, on December 3rd, 1925, reversed said judgment so appealed from with costs of the appeal to the plaintiffs, and having reversed certain findings of fact and conclusions of law made herein and dated January [fol. 295] 19th, 1923, and having made new findings of fact and conclusions of law in lieu of those so reversed, determining among other things that John S. Kedrovsky is the lawful archbishop of the diocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church and as such entitled to occupy the premises mentioned in the complaint, and having directed the entry of judgment in favor of the plaintiffs and against the defendants as below provided with the costs of the action to be taxed by the clerk, and a certified copy of such order having been duly filed in the office of the clerk of the County of New York on December 4th, 1925, and the costs having been duly adjusted by said clerk, it is on motion of Ralph M. Frink, attorney for the plaintiffs.

Ordered, Adjudged and Decreed that the defendants Platon Rojdesvensky and Leonid Turkevich and each of them be and he is hereby enjoined and restrained from oc-

cupying premises mentioned in the complaint, to wit: premises known as numbers 13-15 East 97th Street, in the Borough of Manhattan, City of New York, and as the St. Nicholas Cathedral of the Russian Orthodox Church, and it is further

Ordered, Adjudged and Decreed that the defendants Platon Rojdesvensky and Leonid Turkevich and each of them and their several agents or employees be and they hereby are enjoined and restrained from excluding John S. Kedrovsky, delegate of the Holy Synod of the Russian Orthodox Greek Catholic Church and archbishop of the diocese of North America and the Aleutian Islands of said church, from said premises known as numbers 13-15 [fol. 296] East 97th Street, in the Borough of Manhattan, City of New York, and as the St. Nicholas Cathedral of the Russian Orthodox Church, and from in any way preventing the said John S. Kedrovsky from occupying the said premises, and from interfering in any way with the occupancy of the said premises by said John S. Kedrovsky; and it is further

Ordered, Adjudged and Decreed that the counterclaim of the defendants herein be dismissed on the merits; and it is further

Ordered, Adjudged and Decreed that John S. Kedrovsky as delegate of the Holy Synod of the Russian Orthodox Greek Catholic Church and as archbishop of the diocese of North America and the Aleutian Islands of said church, and Archbishop and Consistory of the Russian Orthodox Greek Catholic Church recover of the defendants Platon Rojdesvensky and Leonid Turkevich the sum of $1,003.15 costs taxed by the clerk and that execution issue therefor.

Judgment dated December 4th, 1925.

James A. Donegan, Clerk.

PLAINTIFF'S EXHIBIT 5

(Pursuant to stipulation this exhibit, which is the Russian text of the ukase of November 20, 1920 (see Plaintiff's Exhibit 5A), is not printed.)

[fol. 297] PLAINTIFF'S EXHIBIT 5-A

The Most Holy Patriarch, the Holy Synod, and the Highest Church Council of the Orthodox Church of Russia

Decision of 7, 20 November 1920, No. 362.

With the blessing of the Most Holy Patriarch, the Holy Synod and the Highest Church Council, in their joint meeting, deliberated concerning the necessity, in addition to the instructions already issued in the circular epistle of the Holy Patriarch to be operative in case if the activity of the Diocesan Councils should stop, to issue similar instructions to the Diocesan Bishops for the case that a given Diocese be severed from the highest Church Administration, or in case the latter's activity stop, and on the basis of the former judgments it was resolved:

To issue instructions to the Diocesan Bishops, in the form of a circular Epistle of His Holiness, for their guidance in necessary cases, as follows:

1. In case that the Holy Synod and the Highest Church Council for whatever reason stop their Church-Administrative activity the Diocesan Bishop will address himself directly to the Holy Patriarch or to the person or body designated by the Holy Patriarch for that purpose, in order to obtain guiding instructions and decisions on matters, which, according to rules would have to come before the highest Church Administration.

2. In case the Diocese (Eparchy), for reasons of movement of the front, the change in government frontiers, etc., would find itself beyond all communication with the highest [fol. 298] Church Administration, or if the highest Church Administration itself with the Holy Patriarch at the head would for any reason discontinue their church-administrative activity, the Diocesan Bishop will immediately get into communication with the Bishops of his neighboring Dioceses for the purpose of organizing a superior instance of Church Authority for several dioceses which would find themselves in similar conditions. (Be it in the form of a temporary highest Church Government or a Metropolitan District or even otherwise.)

3. The care of organizing a higher Church Authority for a whole group of dioceses which would find themselves in conditions outlined in Point 2, is the indispensable duty of the oldest bishop in that group.

4. In case it would be impossible to establish contact with the bishops of the neighboring dioceses, and pending the organization of the highest instance of Church Authority, the Diocesan Bishop will himself assume the full hierarchical power granted to him by the Church canons and will do everything possible to regulate the local church life, and if necessary, to organize the diocesan administration suitable to conditions created, and will decide upon all matters which are placed within hierarchical authority by the canons, with the assistance of the existing offices of the diocesan administration (the Diocesan Convention, Council, etc., or the newly organized ones); in case, however, it would be impossible to organize the latter bodies he will act alone and under his own responsibility.

[fol. 299] 5. In case the situation mentioned in Points 2 and 4 should acquire a protracted or even permanent character, and especially when it would be impossible for the bishops to obtain the assistance of the organs of the diocesan administration, it would appear that the most expedient measure (in the sense of affirmation of church order) would be to divide the diocese into several small dioceses, for which the diocesan bishop will act as follows:

a. He would grant his vicar bishops, who until then according to law had but semi-independent rights, all rights of diocesan bishops and organize under them administrative bodies in conformity with the local conditions and possibilities;

b. He will install, upon sobornal judgment, with the rest of the diocesan bishops, if possible, in all important towns of his diocese new bishop's sees with semi-independent rights or independent.

6. A diocese which would be thus divided as per Point 5, would form itself into a Church District with the bishop of its capitol city as the head; which will take care of the administration of the local church matters according to canon.

7. In case a situation would arise as told in Points 2 and 4, where a diocese will have no bishop, then the Diocesan Council or in its absence the clergy and the laity will address themselves to the bishop of the diocese nearest and most accessible to them in convenience of communication and that bishop will assign to the widowed diocese his vicar or will assume charge of it himself; in cases men-[fol. 300] tioned in Point 5 he will act in that diocese according to Points 5 and 6, whereby at the existence of appropriate data the widowed diocese can be organized into a special Church District.

8. If for some reasons the widowed diocese will not invite the diocesan bishop, the latter, as mentioned Point 7, will assume the care of that diocese and its affairs at his own initiative.

9. In cases of extreme disorganization of church life, when some people or parishes will cease to recognize the authority of the Diocesan Bishop, the latter (if he finds himself in the situation outlined in Points 2 and 6), will not relinquish his hierarchical authority but he will organize out of the people who remain loyal to his parishes, and out of the parishes—districts and dioceses, allowing where necessary to perform services even in private houses and other similar places adapted for that purpose and discontinuing Church communion with the disobedient ones.

10. All measures that were taken locally in accordance with the present instructions and all measures taken thereafter must be submitted for confirmation later to the Central Church Authority when it is re-established.

[fol. 301] PLAINTIFF'S EXHIBIT 6

[Extracts from Minutes of Sobor held at Detroit, April 2-4, 1924.]

Dean Tourkevich

Dean Tourkevich began by saying * * * First the Sobor of Pittsburg- in 1922 elected the Metropolitan [Platon] as the head of the Diocese, bestowing upon him the title of "Metropolitan of All America and Canada." * * *

* * * * * * * *

Rumors appeared lately that Patriarch Tikhon has issued a decree dismissing Metropolitan Platon from the administration of the American Church, demanding that he return to Moscow at the disposition of the Patriarch.

In the document published in the local papers regarding that dismissal of Metropolitan Platon there were two features which were very important characteristics of this document.

First: The contents of the document show that the Metropolitan would receive his dismissal from the Bishop who would be appointed to replace him. This way of communication (by publication in the press) from Patriarch Tikhon to Metropolitan Platon appears unusual, especially if we consider that the first decree regarding the appointment of the Metropolitan to the North American see was sent him by mail.

Second: Also the date of that decree, February 1924, compared with the previous decree appointing him, dated September 29, 1923, appears strange. How could the Patri-[fol. 302] arch in so short a time (four months) freely change his will regarding Metropolitan Platon?

Also the language of the last decree appears suspicious; it resembles very closely the language of Mr. Kedrovsky which he used when, as you remember, he broke into the Cathedral premises in New York. In court Mr. Kedrovsky was trying to prove his rights as to the administration of our Church in America. He very clearly intimated that soon we would receive a decree from Patriarch Tikhon dismissing Metropolitan Platon, and only about a month

later a statement of Evdokim Meschersky was published in the press couched in almost the same language.

If we add to this the very definite information we possess that Patriarch Tikhon is very seriously sick, that the Soviet Government has placed four doctors in attendance upon him, that he already has had several heart attacks, we should realize the conditions under which Patriarch Tikhon has to exercise his authority over the Russian Church; somebody in Moscow is extracting decrees from the sick Patriarch and is using those decrees against him.

To discredit the Patriarch's personality in the eyes of the believers, a decree was published, for example, introducing a new calendar.

We all must know that we are threatened with the danger of losing Metropolitan Platon. In the meantime it is only he who can save our diocese. The merits of His Eminence the Metropolitan before the Russian American Church are recognized not only by our Mother Church of Russia but also by other denominations here in America. [fol. 303] And so we have two documents before us concerning our American Church: one, a decree of the legal Church Authority, undoubtedly forced by the Soviet power, of Patriarch Tikhon regarding the recall of His Eminence the Metropolitan to Moscow, and the other, from the Moscow Synod of the "Living Church", concerning the appointment as administrator of the Russian American Church of Mr. J. Kedrovsky, calling himself Metropolitan.

In view of the fact that we are threatened with great danger in the American courts at the present time, and particularly if America should recognize the Soviet Government, the Metropolitan desires to hear the voice of his diocese; he wants to know how we look upon the future of our Orthodox Church here in America, and upon the threatening danger of losing our church properties, and upon the throwing of the yoke of Bolshevism on the future generation.

[Valerian E. Greaves, Esq.,]

* * * lately there have been outside lawsuits with the "Living Church" which aspires, first, to seize the power over our Church in America and, secondly, to take our church properties.

In such a situation it would be a great mistake to think that we can or must submit to the trend of circumstances, let our Metropolitan go and await a new bishop.

We have just heard the narration of the Very Rev. Leonid Turkevich as to how a bishop is being appointed here and how Metropolitan Platon is being recalled. If it is established beyond doubt that violence is being used [fol. 304] on Patriarch Tikhon, that he is being forced to issue over his signature such acts as he could not issue under conditions of actual freedom, then we are not insured against all kinds of surprises, which could basically under...mine that church order and peace which have with such great labor already been practically arranged by His Eminence the Metropolitan in the Church here, and would involve our Church here in a condition of that same anarchy under the banner of which church life in Russia exists at present. This is why it is necessary, finally, to organize our church life here in America so that nothing from outside would threaten it. We must create our own firm Church administration, completely insured against possibility of the direct or indirect influence of the Soviet power.

The history of our Church in America teaches us how gradually from a mission to enlighten the natives of Alaska and the Aleutian Islands with Christian faith it developed into a large diocese which was built in accordance with the tradition of the mother church of Russia, taking in all necessary adjustments of the local habits and customs of other branches of the Orthodox Church (Galicians, Moldavians, Bukovins, Serbs, Syro-Arabians, etc.).

In 1917 our American Church in fact severed the organic union with the administration of the Church of Russia which existed heretofore and only casually sometimes do we receive news and desires expressed by Patriarch Tikhon (for example through Rev. Pashkovsky, now Bishop Theophilus, we have received instructions for Metropolitan Platon to become head of our Church).

[fol. 305] We love and always will love the Church of Russia, but now there is lawlessness. We see a number of church groups all of which pretend to be governing the church, and through them, to govern our Church here. They will try, of course, to send their agents here. This

was already done by the "Living Church" which sent Mr. Kedrovsky with full credentials. I shall not conceal from you: Mr. Kedrovsky has taken an injunction against 115 of our churches and if we do not stop him, we might soon see Mr. Kedrovsky as head of our Diocese.

There is only one way out of the situation that has arisen: we must exist independently. In the future no one can and must not either appoint or recall bishops, without the will to do so on the part of the Sobor of the American Orthodox Church. We ourselves establish church authority for ourselves.

V. Rev. Chepeleff

At present we see in Russia two church authorities—one the legal church administration headed by the legally elected Patriarch Tikhon, the other one, the so-called "Holy Synod" headed by Evdokim.

What is the authority of that Moscow Synod which came to power in a revolutionary way into the heart of our Church?

The other day, Evdokim, the President of that Synod, addressed himself officially through the press to all countries, explaining what that Synod was in Russia. He wrote: "In view of the rumors spread abroad that the Russian Church headed by the Holy Synod is a consolidation of different groups, I herewith declare that now there [fol. 306] are no "Living", "Soviet", "Red", Churches but there is only one Holy Apostolic Church, etc."

I declare to this Sobor and request that my words be put into the minutes that the above official document is not in conformity with the facts. I was acquainted personally and through documents with the manner in which Moscow High Church Administration was organized; since last year it has changed its name to the Holy Synod. I declare to this Sobor that that Synod headed by Evdokim is organized from very small groups. The order in which that Synod is being composed is like this: a group of church members, sometimes five or six people (for instance, the group of the present Secretary of the Synod, Mr. Novikov, which calls itself the "Apostolic Church") was registered in the Moscow Soviet, obtained legal existence, and after presenting its charter to the HCA [Highest

Church Administration] demanded that it be represented therein. Thus in the HCA were represented groups such as the "Living Church", the "Apostolic Church", the "Church of Renovation" and the "Labor Church", etc., and in view of its group composition, the HCA adopted the "formula of Eucharistical Unity" in order to guarantee the continuity of their work. The reference made by Evdokim to that fact that this group composing the Synod was approved by their Sobor of 1923 and that it was even re-elected by the same, has no meaning, for the Sobor itself was a convention of a group.

Therefore, the so-called Moscow Holy Synod is but a group and does not represent the will and conscience of the Russian Orthodox Church, but only the will of revolutionary groups insignificant in quantity and quality.
[fol. 307] I am not even mentioning here that by its actions this group organization, which broke the dogmatic traditions of the Church, has brought itself down to the status of an heretical sect.

Patriarch Tikhon, who is heading the Russian Orthodox Church, now called by the Soviets the "Old", "Dominating" and "Counter-Revolutionary" Church, is from the point of view of the communistic ideology the personification of the bourgeois ideology imbued with the ideas of Christianity. It is therefore absolutely inadmissible to the governing political party of the Bolsheviks. The fact that the Soviet power still tolerates Patriarch Tikhon is only because he is an achievable means of influencing opinion at home and public opinion abroad. I have not the slightest doubt that all that the Patriarch now does to administer the Patriarchate he is doing under duress. Over there it is done very simply: he is summoned to the respective commissariat and presented with decrees prepared beforehand which he is "to execute". As everything is done to "consolidate the conquests of the revolution" his refusal to comply with the demands of the Soviet power will be openly called counter-revolution and sabotage. He would then be deprived of any kind of contact with his office.

The Holy Sobor can judge itself how near to normal are those conditions of governmental existence under

which the Patriarch has to realize his right of administration of the Russian Church.

In Russia at the present time there is no freedom of religion more than that—at the present time in Russia there exists the most cruel and merciless persecution of any religion and of its representatives, while they have entirely [fol. 308] enslaved the Orthodox Church and made her a servant of their political interests.

But in this problem of the future of our Orthodox Church in America there exists a very important side which must be mentioned as it is usually used by the "Rights" and the "Lefts" who accuse us of betrayal of our mother church and of her Patriarch.

I have in view that disquieting question which every one of us puts to himself: what would be the Most Holy Patriarch Tikhon's attitude if our American Church, in view of all that is now happening in Russia, should begin to live by herself, pending the establishment of order in the life of the Russian Church.

To answer this natural question allow me to mention to this Sobor two documents which were written by Patriarch Tikhon.

The first document: At the end of 1921, Patriarch Tikhon addressed a circular letter to all diocesan bishops wherein he states in part, "If, in case the borders of the new states which were created on the territory of Russia should be moved or in case of the moving of the front lines, different dioceses should be cut off from the central administration of the church, the ruling bishop of such territory shall receive full authority to organize the administration of the local churches".

In this document what is substantially of importance to our Church in America is that we, actually, for a good many years now, as Mr. Greaves rightly said here, have been cut off from the highest organ of the administration of the Russian Church which is Patriarch Tikhon.

The second document: On November 24th, 1905, Patriarch Tikhon, then Archbishop of North America and the [fol. 309] Aleutian Islands, had presented a report to the old Holy Synod of Russia regarding reforms in the Church. This is what he wrote:—"The North American

Diocese should be reorganized into an Exarchate. In fact it consists not only of different nationalities but of different Orthodox Churches which however united in faith, have different peculiarities in their economic order, in their ritual and their parish lives. In North America can be organized a Holy Exarchate of Orthodox National Churches with their own bishops headed by the Exarch—the Russian Archbishop. It must also be remembered that life in the New World compared to the rule in Europe has its peculiarities which should be reckoned with by our Church. It therefore should receive fuller autonomy (autocephaly) than in other Metropolitan districts in Russia" (Quoted from reports of Diocesan Bishops regarding Church Reform, Part I, St. Petersburg Synodal Press, 1906, page 531).

We therefore see that twenty years ago Patriarch Tikhon understood that outside of economic reasons a practical interest existed to grant to the North American Church a broad autonomy and even autocephaly. (page 530).

Since that time today there are too many practical reasons that compel us to live by ourselves.

* * * * * * *

The debate which followed showed the unanimous desire of the members of the Sobor to keep our American Church from Soviet interference.

There is no doubt, said the Very Rev. Klopotovsky, that we all stand for the Patriarch. But do you know that he would be thankful to us if we separated from him? By [fol. 310] such an act we would relieve his heavy cross. Do not forget that soon we will have to pay the Receiver 5% of our church income. We will not be allowed to drive a nail into the wall of any of our churches without the permission of the Receiver. It has been said that the Patriarch is going to send us a bishop from Russia. We should know that no bishop will be permitted to leave Russia for abroad except a "Living Church" one. Look at the example of the Japanese Church: it is long since autocephalous.

It was submitted to the Sobor that resolutions should

be worked out disposing of the two basic problems facing our church:

(1) To leave Metropolitan Platon as the head of our Church here,

(2) to recognize ourselves as a self-governing Church.

A committee was nominated to word these resolutions. A recess was announced.

At 7:30 p. m. the Chairman opened the evening session of the Sobor . . .

V. E. Greaves suggests that only the resolution parts of the proposed preambles and resolutions be voted upon.

The suggestion of Archpriest L. Turkevich as to voting on the preambles is disapproved and the Sobor proceeds to voting on the resolutions in the order suggested by V. E. Greaves.

Point 1. To recognize that His Eminence Metropolitan Platon may be removed from the Diocese only in a legal manner and not otherwise than with the agreement of the flock that elected him.

This Point 1 is adopted unanimously.

. . . . . .

[fol. 311] Point 1. Temporarily, until the convocation of the All Russian Sobor further indicated in Point 5, to declare the Russian Orthodox Diocese in America a self-governed Church so that it be governed by its own elected Archbishop by means of a Sobor of Bishops, a Council composed of those elected from the clergy and laity, and periodic Sobors of the entire American Church.

Point 1 is adopted by an overwhelming majority with 6 against and 2 abstaining.

. . . . . .

Point 2. To ask filially the Most Reverend Metropolitan Platon to head the administration of the Church and to rule it first with the cooperation of the existing Council of Bishops and Diocesan Council and to elaborate in speedy order a plan for the permanent administration of the American Church for the future, which, in agreement with the foundations of Orthodoxy, must be organized upon the basis of elected Sobors.

Note. The term "speedy order" must be understood in the sense of a definite period of six months.

Point 2 is adopted * * * with 1 abstaining and 2 against.

Point 3. To filially ask the Most Reverend Metropolitan Platon together with all the bishops to approve this resolution and to inform all the Eastern Churches of the reorganization which has taken place.

This Point is adopted * * * with 1 abstaining and 2 against.

[fol. 312] Point 4. Not to break at all the spiritual ties and communion with the Russian Church, but always to pray for her good, give her every cooperation and mention the Most Holy Patriarch as the head of the Russian Mother Church to which the American Church is obligated for her existence.

This Point 4 is adopted unanimously.

Point 5. To leave the final regulation of questions arising from the relationship of the Russian and the American Churches to a future Sobor of the Russian Orthodox Church which will be legally convoked, legally elected, will sit with the participation of representatives of the American Church under conditions of political freedom, guaranteeing the fullness and authority of its decisions for the entire Church, and will be recognized by the entire Oecumenical Orthodox Church as a true Sobor of the Russian Orthodox Church.

Point 5 is adopted unanimously.

Point 6. For participation in the working out of a new constitution of the American Church, as well as for the elaboration and execution together with the Bishops of all acts and measures as shall be needed in the development of the reorganization of the American Church, to elect six delegates from the Sobor, of which 3 from the clergy and 3 from the laity, to whom shall be turned over all the questions indicated in the name of this Sobor, being guided by the resolution of the All-Russian Church Sobor of 1917 and 1918.

* * * * * * * * * *

* * * Point 6 is adopted * * * with two against and none abstaining.

[fol. 313] Point 7. To consider the present resolution effective until there shall take place an All-Russian Church

Sobor, under the conditions indicated above in Point 5, guaranteeing its freedom and legality, and at that Sobor final agreement shall be reached as to the fate of the American Church.

Point 7 is adopted unanimously with one abstaining.

* * * * * * * *

PLAINTIFF'S EXHIBIT 6-A

(Pursuant to stipulation this exhibit, which consists of extracts from the minutes of the Sobor held at Moscow in 1923 and appears in the printed Case on Appeal in *Kedrovsky* v. *Rojdesvensky* at pp. 493-543, is not printed.)

[fol. 314] PLAINTIFF'S EXHIBIT 7 FOR IDENTIFICATION

At a Special Term, Part I of the Supreme Court held in and for the County of New York at the County Court House in said county on the day of June, 1926.

Present: Hon. George V. Mullan, Justice.

JOHN S. KEDROVSKY, as Archbishop of the North American diocese of the Russian Orthodox Greek Catholic Church and as delegate of the Holy Synod of said church, *Plaintiff*,

against

ST. NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA, *et al.*, *Defendants*

Plaintiff's motion for a temporary injunction having duly come on to be heard, now upon reading the notice of said motion dated May 28th, 1926, and the affidavit of John S. Kedrovsky, sworn to May 29, 1926 thereto annexed, and the summons and complaint verified May 29, 1926, in support of said motion, and the affidavits of Valerian E. Greaves and of George Gordon Battle, and of H. H. Shepard, all sworn to June 7, 1926, and a copy of the petition of Benjamin Basalyga to the Sixth District [fol. 315] Municipal Court, verified April 15th, 1926, and

a copy of the answer to said petition in said Sixth District Municipal Court, in opposition, and after hearing Ralph M. Frink, attorney for plaintiff in support of said motion, and George Gordon Battle, of counsel for defendants in opposition thereto, and upon filing the opinion of the court, and upon reading the following additional papers received upon a re-argument of the motion, to wit—the affidavit of George Gordon Battle, sworn to June 19, 1926, and the affidavits of Ralph M. Frink, sworn to June 1 and 21, 1926, and the court having upon such re-argument adhered to his original decision and upon filing the opinion of the court upon such re-argument, and the court having required as a condition of granting this motion that the plaintiff consent to an order of preference, so that this action may be disposed of early in the October term, 1926, and plaintiff hereby consenting to such preference, and the plaintiff having filed the security required by law in the sum of $250., it is upon motion of the attorney for the plaintiff, hereby

Ordered that pending the determination of this action the defendant St. Nicholas Cathedral of the Russian Orthodox Church in North America and its several officers, agents, servants, representatives, be and each of them hereby is restrained and enjoined from interfering in any way with the occupancy of said premises known as numbers 13-15 East 97th Street, in the County of New York, by the plaintiff John S. Kedrovsky and by his agents, and from interfering in any way with his or their performing religious services and official activities on said premises.

Enter, J. S. C.

[fol. 316] SUPREME COURT, NEW YORK COUNTY

JOHN S. KEDROVSKY, as Archbishop, etc., *Plaintiff*,

against

ST. NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA, *et al.*, *Defendants*

COUNTER ORDER PROPOSED BY DEFENDANTS

Battle, Vandiver, Levy & Van Tine, Attorneys for Defendants, No. 37 Wall Street, Borough of Manhattan, New York City.

Service of the within proposed order is hereby admitted, Ralph M. Frink, per F. J.

Dated at New York, June 24, 1926, Attorney for Plaintiff.

[fol. 317] Sir: Please take notice that the proposed Order of which the within is a copy will be presented to the Honorable George V. Mullan one of the Justices of this Court for settlement at Special Term, Part I on the 25th day of June 1926, at Ten o'clock in the forenoon.

Yours, etc., Battle, Vandiver, Levy & Van Tine, Attorneys for Defendant. Office and P. O. Address, No. 37 Wall Street, Borough of Manhattan, New York City.

To Ralph M. Frink, Attorney for Plaintiff, 233 B'way.

[fol. 318] PLAINTIFF'S EXHIBIT 7-A FOR IDENTIFICATION

SUPREME COURT, NEW YORK COUNTY

JOHN S. KEDROVSKY, ETC., *Plaintiff*,

vs.

ST. NICHOLAS CATHEDRAL, ETC., *et al.*, *Defendants*

MEMORANDUM ON SETTLEMENT OF ORDER

The difference between the two proposed orders are as follows:

Defendants' order omits the recital of the grounds upon which the order is made, required by Section 821, C.P.A. Certainly the court, in making an order, should comply with the requirements of this section.

The other difference is that defendant's proposed order omits from the list of persons in representative capacity enjoined,

"any and all persons asserting any right, title or interest" of the defendants. It would seem proper to make the injunction apply to such persons expressly, in order to avoid any more controversy on such point.

The attention of the Court is called to the fact that defendant has made a motion before Mr. Justice Proskauer to dismiss the complaint on the ground that it does not state facts sufficient to constitute a cause of action; and [fol. 319] Mr. Justice Proskauer has reserved decision. If he should grant this motion, there would be two conflicting orders, since the granting of the motion for a temporary injunction necessarily involves a holding that the complaint is sufficient. It would seem proper, therefore, that if Mr. Justice Proskauer does not regard the matter as having been adjudicated by the decision upon this motion, the signing of the order might be held up for a day or so, so that if Mr. Justice Proskauer should require a new complaint to be served, that might be included among the motion papers in place of the original complaint.

Respectfully submitted, Ralph M. Frink, Attorney for Plaintiff.

21435, 1926.

[fol. 320 PLAINTIFF'S EXHIBIT 7-C FOR IDENTIFICATION

NEW YORK SUPREME COURT, NEW YORK COUNTY

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA, *Plaintiff*,

against

JOHN KEDROFF, *et al.*, *Defendants*

Before Hon. Bernard Botein, Justice, at Trial Term, Part X, without a jury.

AFFIDAVIT OF RALPH MONTGOMERY ARKUSH

STATE OF NEW YORK,
County of New York, ss.:

Ralph Montgomery Arkush, being duly sworn, deposes and says:

1. I am the attorney for the plaintiff in the above entitled action. At the trial there was admitted and deemed marked in evidence as Plaintiff's Exhibit 7 a paper taken from the files of the County Clerk and at the time supposed to be a temporary injunction order in an action in this court entitled "John S. Kedrovsky, as Archbishop of the North American diocese of the Russian Orthodox Greek Catholic Church and as delegate of the Holy Synod of said church, plaintiff, against St. Nicholas Cathedral of the Russian Orthodox Church in North America, *et al.*, defendants" (herein called the Injunction Action). The County Clerk's file number of said action is 21435/1926. [fol. 321] Later in the course of the trial it appeared that the paper so deemed marked in evidence was unsigned and thereupon it was struck out [*supra*, p. 163]. Counsel for the plaintiff indicate to the Court that they would make a further search for the signed order or evidence of its existence. Such a search was made and the following report is now submitted.

2. Personally, or through my assistants, I have examined the Clerk's minutes and files in the present action, the Injunction Action and two other actions in this Court in which John S. Kedrovsky was plaintiff and the Clerk's

minutes in a proceeding brought in the Municipal Court, Sixth District, by St. Nicholas Cathedral of the Russian Orthodox Church in North America (the present plaintiff, hereinafter called the Cathedral Corporation), as petitioner, against John S. Kedrovsky as occupant and Alexander J. Chechila as undertenant. I have also examined the files and records of the law firms of Zabriskie, Sage, Gray & Todd, Esqs., and Battle, Vandiver, Levy & Van Tine Esqs., both of which firms acted as counsel for the Cathedral Corporation in 1926. I have also had personal interviews with George Gordon Battle, Esq. and Henry H. Shepard, Esq. who were the attorneys in the office of Battle, Vandiver, Levy & Van Tine, Esqs., particularly concerned with the Injunction Action. I have also had a personal interview with George Gray Zabriskie who with his father, the late George Zabriskie, was the attorney in the office of Zabriskie, Sage, Gray & Todd, Esqs., particularly concerned with matters affecting the Cathedral Corporation. The following allegations are made on the basis either of [fol. 322] my personal knowledge or of the examinations and interviews aforesaid.

3. The Cathedral Corporation, as petitioner, brought a forcible entry and detainer proceeding against John S. Kedrovsky as occupant and Alexander J. Chechila as undertenant on April 16, 1926, in the Municipal Court, Sixth District (Index No. 1714). The petitioner alleged a forcible entry on the premises Nos. 13-15 East 97th Street by the defendants Kedrovsky, Chechila and their agents and servants, on April 2, 1926, and the ejection therefrom of one Benjamin Basalyga (alleged to be the agent and custodian of the petitioner) and of the petitioner and prayed for an order removing the occupant, the undertenant, their agents and servants from possession. Zabriskie, Sage, Gray & Todd were attorneys of record for the petitioner and George Gordon Battle trial counsel. The attorney of record and trial counsel for the defendants was Ralph M. Frink. The defendants filed an answer setting up various defenses centered principally on the claim of Kedrovsky to be the ruling archbishop of the North American diocese as established by the judgment in the case of *Kedrovsky et al.*, v. *Rojdestvensky et al.*, affirmed by the Court of Appeals on March 30, 1926. The proceeding came on for

trial before Mr. Justice Blau on May 14, 1926. After the petitioner had put in its proof and rested and a motion of the defendants to dismiss had been denied the trial was adjourned; before the adjourned date Mr. Justice Blau adjourned his term in the Sixth District so that it became necessary to restore the case to the calendar for a new trial. On May 26, 1926, the petitioner's attorneys sent a [fol. 323] stipulation to the defendants' attorney restoring the case to the calendar but this stipulation was never returned and no further steps were taken in the proceeding.

On June 2, 1926, a notice of motion dated May 28 for a temporary injunction in the Injunction Action, the complaint and supporting affidavit of John S. Kedrovsky verified May 29 and the summons were served on Valerian E. Greaves, who was named as an individual defendant and was also an officer of the Cathedral Corporation. All of the individual defendants were or had been trustees of the Cathedral Corporation. The complaint alleged that the plaintiff Kedrovsky was the archbishop of the North American diocese entitled to occupy St. Nicholas Cathedral; that the judgment in the action of *Kedrovsky* v. *Rojdestvensky* was binding upon the parties to the Injunction Action as parties to the former action or persons in privity to the parties thereto and that the defendants had interfered with the plaintiff's occupancy of the premises and were still attempting and threatening so to do. The prayer for relief was as follows:

> "Wherefore plaintiff demands judgment against the defendants and each of them, enjoining and restraining said defendants, their several trustees, officers, agents, servants and representatives and any and all persons asserting any right, title or interest of the defendant corporation in or to such premises, from occupying the said premises mentioned in the complaint and from interfering in any way with the occupancy of the same by the plaintiff or with his performing religious services and official activities of said [fol. 324] premises, and that plaintiff have judgment against the defendants for such other and further relief as may be just, together with a temporary injunc-

tion to such effect, pending the determination of the action, and costs and disbursements of the action."

No mention was made in the complaint of the Municipal Court proceeding but in the affidavit supporting the motion for a temporary injunction that proceeding was referred to and the statement made that it had not yet been tried. In an opposing affidavit of Mr. Greaves verified June 7, 1926, it was stated:

"The plaintiff is evidently trying to get this court to make a blanket injunction order based upon the bringing of that summary proceeding which plaintiff could then claim had the effect of inferentially restraining the defendants from going on with the summary proceeding."

The motion for temporary injunction appeared as No. 84 on the Special Term, Part I, calendar before Mr. Justice Mullan on June 7, 1926 (N. Y. L. J., p. 1048).

On June 12, 1926, the following decision by Mr. Justice Mullan was published (N. Y. L. J., p. 1141):

"I have reached the conclusion that the contention of plaintiff's counsel is well founded and that the only fair and equitable way of disposing of the entire body of controversy is to throw the whole matter into the Supreme Court, where all the issues can be decided. [fol. 325] In order, however, that the determination of defendant's claim to right of possession be not too long put off, I shall make it a condition that the plaintiff consent to an order of preference, so that this action may be disposed of in the early part of October next."

On June 12, 1926, the plaintiff's attorney served a proposed order with notice of settlement on June 15. On June 14 Mr. Battle wrote to Mr. Justice Mullan asking for reargument or, if his request should be denied, asking for two days within which to submit a counter proposal of injunction order. On June 15 Judge Mullan's secretary wrote to counsel setting the reargument for June 21. On June 14 United States Fidelity and Guaranty Company executed an undertaking on injunction in the sum of $250.

By notice dated June 19, 1926, returnable June 24, the defendant Cathedral Corporation moved to dismiss the complaint for insufficiency.

The reargument of the motion for temporary injunction was had on June 21 and the decision of Mr. Justice Mullan, granting the reargument and adhering to his original decision appeared on June 23 (N. Y. L. J., p. 1302). On June 24 the defendants' attorneys served a counter order with notice of settlement on June 25. The counter order read as follows:

[The counter order is printed above as Plaintiff's Exhibit 6 for identification.]

On June 24 the motion to dismiss the complaint came on before Mr. Justice Proskauer at Special Term, Part III. In a memorandum opposing the motion Mr. Frink stated:

> [fol. 326] "Mr. Justice Mullan granted a motion for a temporary injunction in this action under section 877, C. P. A. The papers are still before him, as the order has not yet been signed."

Decision on the motion to dismiss was reserved.

In a memorandum on settlement of the injunction order Mr. Frink stated:

[The memorandum is printed above as Plaintiff's Exhibit 7-A for identification.]

Under date of June 28, apparently at the suggestion of Mr. Justice Proskauer, a stipulation was signed that the motion to dismiss the complaint be withdrawn, that the plaintiff have before July 6 to serve an amended complaint and that on July 13 reargument of the motion for temporary injunction be had before Mr. Justice Mullan. The withdrawal of the motion to dismiss was approved by Mr. Justice Proskauer on June 30, 1926.

Evidently Mr. Justice Mullan signed and filed the injunction order the next day, since the first entry in the Clerk's minutes of the Injunction Action is dated July 1, 1926, and reads "Order 7" (Plaintiff's Exhibit 8 in the present action). The number of filed papers, as so noted in the Clerk's minutes, to wit seven, corresponds with the number which would have been filed by Mr. Justice Mullan

after signing an order granting a temporary injunction, if it be assumed that papers bound and backed together were counted as one paper by the person in the Clerk's office who made the entry in the minutes. I am advised by the Clerk's office that papers bound and backed together are often counted as one for the purpose of entry in the Clerk's [fol. 327] minutes. On this assumption the filed papers were as follows: (1) notice of motion with annexed affidavit, summons and complaint, (2) answering affidavits of June 7 and Municipal Court pleadings, (3) answering affidavit of June 19, (4) replying affidavit of June 7, (5) replying affidavit of June 21, (6) decision, (7) order.

The Law Journal of July 2 (p. 1408) carried a notice of the signing by Mr. Justice Mullan at Special Term, Part I, of an order in "Kedrovsky *v.* St. Nicholas Cathedral &c."

On July 1, 1926, an amended complaint was verified. The prayer for injunctive relief was in substantially the same terms as in the original complaint.

A notice of motion by the Cathedral Corporation to dismiss the amended complaint for insufficiency, dated July 20, 1926, came on for argument before Mr. Justice Crain at Special Term, Part III, on July 27. In a supplemental memorandum dated July 27, 1926, submitted on behalf of the defendant Cathedral Corporation in support of the motion to dismiss the amended complaint the following statement was made:

> "Plaintiff also urged on the argument that the granting of the motion for a temporary injunction in this action forecloses the defendants from questioning the sufficiency of the complaint as this question must of necessity have been decided by Mr. Justice Mullan in the motion for the temporary injunction. The facts in this phase of the situation are that after the determination of the motion for a temporary injunction, the present moving party attacked the complaint for in- [fol. 328] sufficiency and was sustained by Mr. Justice Proskauer. However, in view of the Judge's early departure for Europe, he suggested the withdrawal of the motion for judgment and the granting of leave to the plaintiff to amend and the subsequent argument

on the question of sufficiency of the amended complaint, all by stipulation. It was further suggested by Mr. Justice Proskauer that the proposed order presented by counsel in the temporary injunction motion be held in abeyance by Mr. Justice Mullan pending the further argument on the sufficiency of the amended complaint. To the surprise of counsel not only for the defendant, but for the plaintiff, Mr. Justice Mullan signed one of the orders submitted, granting a temporary injunction. * * *"

Mr. Justice Crain made and filed an order denying the motion on July 29, 1926. His memorandum opinion was as follows:

"This is a motion for an order dismissing the amended complaint herein on the ground that it appears on the face of the said amended complaint that it does not state facts sufficient to constitute a cause of action. It is brought by one who asserts that he and another have the exclusive right to occupy premises 13-15 East 97th Street and that such premises are now in part occupied by the defendant, whose continued partial occupation the plaintiff seeks by this action to prevent by injunction. If the complaint contains allegations which if true show that plaintiff and such other have such exclusive right of occupancy and if the complaint contains allegations which if true [fol. 329] show that the defendants are occupying such premises without the express or implied consent of the plaintiff and such other and the remedy for such unlawful occupancy is a judgment enjoining the defendants from so occupying the premises, the complaint states a cause of action. It contains what purport to be statements of fact from which it would follow that the plaintiff, because of his ecclesiastical office and the person holding the office of dean and their agents and permittees have the sole and exclusive right of occupancy, and it does allege that the defendants are in partial occupation and it negatives that they are agents or permittees of the plaintiff. The complaint contains unnecessary and confusing allegations and some that militate against the alleged right

asserted by the plaintiff, but the motion to dismiss is denied without costs and defendants' time to answer is extended until ten days after the service upon their attorneys of the order entered on the decision of this motion with notice of entry."

N. Y. L. J., July 30, 1926, p. 1652.

The entry in the Clerk's minutes as of July 29 is "Order 3" doubtless referring to the (1) notice of motion to dismiss amended complaint with annexed amended complaint, (2) decision, (3) order.

On July 31 Mr. Battle wrote to Judge Crain requesting reargument which was granted on August 3 and the reargument was had on August 6.

[fol. 330] The undertaking on injunction which had been executed on June 14 by United States Fidelity and Guaranty Company was approved by Mr. Justice Valente on August 26, 1926, and filed on the following day. The filing of the undertaking is the third and last item noted in the Clerk's minutes (the fourth and fifth items which appear on Plaintiff's Exhibit 8 referred to papers in another action and the minutes now show that these papers have been transferred to another file). According to a letter dated January 14, 1941, written by Charles Benowitz, attorney for Nicholas Kedroff, the son and alleged successor in office of John S. Kedrovsky, the fifteenth annual premium on said undertaking had been paid to the surety company.

On November 13, 1926, Mr. Battle wrote to Judge Crain inquiring as to the disposition of the motion to dismiss the amended complaint and received from the Judge a reply dated November 17 stating:

"As you know, I granted at your request a reargument and you came to my Chambers and the reargument, as I understood it, was then had. I waited for some time for the reception of a brief from you and then, I think, after two or three weeks, not hearing from you I concluded to adhere to my original decision and the papers were returned to the County Clerk's office."

On January 31, 1927, Mr. Battle wrote to the younger Mr. Zabriskie as follows:

> "In regard to the reargument of the motion to dismiss the complaint in this matter, you will recall that [fol. 331] this reargument was had before Mr. Justice Crain, at his Chambers, on August 6, 1926. The next day (August 7, 1926) I wrote your father a letter, a copy of which I enclose for your information. I understood at the argument that we were to submit no further briefs. I thought the Court was going to decide the matter upon the oral argument, and I did not think a brief was necessary in addition to the briefs already filed, as we had submitted a very complete memorandum in support of our motion. As we did not hear anything further, I wrote Mr. Justice Crain, on November 13th a letter, a copy of which I also enclosed and received from him a letter dated November 17, 1926, a copy of which I herewith hand you. I think it is quite clear that Mr. Justice Crain intends to adhere to his original decision. He reached that decision after our oral argument. I do not think that the submission of a brief would have any effect upon him, nor do I think the present submission of any brief would have any effect.
>
> In my judgment, therefore, I think it would be futile to make any effort to revive the motion. I should be very glad, however, to have your views in the matter and to take any action that you and your father might think wise."

In reply Mr. Zabriskie wrote to Mr. Battle on February 10, 1927, as follows:

> "I have gone over with my father the question raised by your letter of January 31st. We agree with you that it would probably not be worth while [fol. 332] to go any further with the motion to dismiss the complaint before Judge Crain. It seems to us that there are three possible courses now open to the Cathedral. The first would be to enter some kind of an order upon Judge Crain's decision on the reargument adhering to the decision embodied in his

previous order and then appeal from it. Without going into the question carefully, however, I should think it doubtful whether such an order could be so framed as to be appealable. If that course is not taken you could serve an answer and obtain a bill of particulars of the complaint. It seems possible that such bill of particulars might show more explicitly than the complaint does that the only interference plaintiff could prove would be the summary proceeding in the Municipal Court to remove him for forcible entry, which has been pending and in obeyance ever since Judge Mullan granted the temporary injunction which was not appealed from. Accordingly it might turn out that a further motion could be based upon the complaint and bill of particulars under Section 476 of the Practice Act, upon which the previous decisions of Judges Mullan and Crain would not be binding. My father and I are inclined to the opinion that this would be the best course to follow. If, however, you should deem it better after answering to bring the case on for trial, we have no doubt your judgment would be sound. The end in view is, of course, to get rid of the temporary injunction which I supposed until recently had been appealed from, so that the summary [fol. 333] proceeding in the Municipal Court may be resumed. I do not see how, if that proceeding is permitted to be tried, it can help resulting in a final order removing Kedrovsky from the Cathedral. He might be able to get back eventually under the decision of the Court of Appeals in his main suit, but possession is nine points of the law, and it might be possible to raise new obstacles. We hope, therefore, that you will soon be able to decide upon the best course to pursue to get rid of the temporary injunction, and may be successful in that object."

In a letter dated March 5, 1927, from Mr. Battle to the younger Mr. Zabriskie the following appears:

"You will, I know, pardon my delay in answering your letter of February 10th * * *

In regard to the question raised in your letter, I think it would be wise to serve an answer to the com-

plaint and then get a bill of particulars. We could then determine whether it would be wise to make a motion upon the complaint and bill of particulars under Section 476 of the Practice Act. If we did not make such a motion, the other remedy would be to bring the action on for trial. I am not, however, very sanguine of success in obtaining a court order to eject Kedrovsky from the Cathedral. While our case for doing so is technically strong, still in view of the fact of the decision of the Court of Appeals, I am afraid that the Courts will find some way to avoid putting him out.

[fol. 334] I shall be glad to discuss these matters with your father and yourself whenever you desire."

In the light of the foregoing it is clear that an injunction order was filed on July 1, 1926, and was at all times in effect during the lifetime of John Kedrovsky. It is also clear that the injunctive provisions of the signed order were identical with those contained in the counter order which was deemed marked in evidence as Plaintiff's Exhibit 7 and then struck out except that the signed order also enjoined "every and all persons asserting any right, title or interest" of the defendants.

Wherefore, I respectfully pray that the unsigned counter order again be deemed in evidence as Plaintiff's Exhibit 7 and that Mr. Frink's "Memorandum on Settlement of Order", which is in the Clerk's file and specifies the differences between the two proposed orders, be received in evidence and deemed marked Plaintiff's Exhibit 7a.

[Sworn to by Ralph Montgomery Arkush on November 28, 1947.]

[fols. 335-337] PLAINTIFF'S EXHIBIT 8

File No. 21433:

Clerk's Minutes—No. 17—1926, 20801 to 23399, County Clerk's Office, 21435.

John S. Kedrovsky

vs.

St. Nicholas Cathedral etc.

1926 July 1, Order 7, 1926 July 29, Order 3, 1926 Aug 27, Bond, 1927 Mch 22, No of Exceptions, 1927 Mch 22, No of Appeal.

[fol. 338] PLAINTIFF'S EXHIBIT 11

This Indenture, made the 17th day of April nineteen hundred and twenty-five, between the Russian Orthodox St. Nicholas Church in New York, a domestic corporation of 15 East 97th Street, Borough of Manhattan, City, County and State of New York, party of the first part, and the St. Nicholas Cathedral of the Russian Orthodox Church in North America, a domestic corporation, of 15 East 97th Street, Borough of Manhattan, City, County and State of New York, party of the second part,

Witnesseth, that the party of the first part, pursuant to a statute entitled "an Act to incorporate the St. Nicholas Cathedral of the Russian Orthodox Church in North America" passed by the legislature of the State of New York and approved by the Governor of the State on the 8th day of April, 1925 (chapter 463) and in consideration of One Dollar, lawful money of the United States, paid by the party of the second part, and other good and valuable considerations, does hereby grant and release unto the party of the second part, its successors and assigns forever,

All those certain three lots, pieces or parcels of land, situate, lying and being in the Borough of Manhattan, of the City of New York, which taken together are bounded and described as follows:

Beginning at a point on the Northerly side of East Ninety-Seventh Street, distant two hundred and fifty

(250) feet, easterly from the intersection of the Northerly side of Ninety-Seventh Street with the Easterly side of Fifth Avenue, thence northerly parallel with Fifth Avenue, One hundred (100) feet eight and one-
[fol. 339] half (8½) inches, more or less to the middle line of the block; thence Easterly along said middle line of the block and parallel with Ninety-Seventh Street, seventy-five (75) feet; thence southerly and parallel with Fifth Avenue One hundred (100) feet eight and one-half (8½) inches more or less to the Southerly side of Ninety-Seventh Street; thence Westerly along said Northerly side of Ninety-Seventh Street, seventy-five (75) feet to the point or place of beginning.

Being the same premises heretofore conveyed to Charles B. Curtis by Joseph Kolbfleisch by deed dated July 16, 1899, and recorded in Liber 2255 of Conveyances, page 101, on August 1, 1899. Said premises being now known as #15 East 97th Street, and being the same premises described in Liber 191 of Conveyances, page 166, in the office of the Register of the County of New York, and being the same premises described in Liber 323 of Conveyances, Page 60, in the Office of said Register.

Together with all right title and interest of the grantor in and to any strips or gores of land adjacent to or adjoining said premises.

Together with the buildings of the Church and rectory erected on said land, appurtenances and all the estate and rights of the said party of the first part in and to said premises.

Together with all personal property belonging to the party of the first part and being in the above-described premises.

To have and to hold the above-granted premises with the said party of the second part, its successors and assigns forever,

[fol. 340] Subject to all provisions set forth in the above-said Act approved by the Governor of the State of New York on the 8th day of April, 1925 (chapter 463).

Subject also to such mortgage or mortgages as may lawfully appear on the record.

And the party of the first covenants as follows:

First. That the party of the first part is seized of the said premises in fee simple, and has good right to convey the same;

Second. That the party of the second part shall quietly enjoy the said premises;

Third. That the said premises are free from encumbrances;

Fourth. That the party of the first part will execute or procure any further necessary assurance of the title to said premises;

Fifth. That the party of the first part will forever warrant the title to the said premises.

In Witness Whereof, the party of the first part has caused its corporate seal to be hereunto affixed and these presents to be signed by its Trustee, Hon. Michael M. Oustinoff, the day and year first above written.

Witness: Valerian E. Greaves.

Russian Orthodox St. Nicholas Church in the City of New York, By Michael M. Oustinoff, Trustee, Russian Consul General, New York [Seal].

[fols. 341-342] *Duly sworn to by Michael M. Oustinoff, Jurat omitted in printing.*

[fol. 343] PLAINTIFF'S EXHIBIT 13

(Pursuant to stipulation this exhibit, which is a telegram dated March 22, 1945, from Metropolitan Theophilus to Ralph Arkush, is not printed.)

PLAINTIFF'S EXHIBIT 14

(Pursuant to stipulation this exhibit, which consists of the minutes of a special meeting of the board of trustees of the plaintiff corporation held on July 10, 1945, is not printed.)

PLAINTIFF'S EXHIBIT 15

(Pursuant to stipulation this exhibit, which is a copy of the act approved April 10, 1945 (L. 1945, c. 693), enacting Article 5-C of the Religious Corporations Law, is not printed.)

PLAINTIFF'S EXHIBIT 15-A

Thus receiving the right to legal existence (official registration, May 18-31, 1927), we clearly take account of the fact that with rights we also take on obligations with reference to the authorities who give us these rights—and thus I have taken upon myself, in the name of the whole of our Orthodox old-church (Tikhon) hierarchy and flock, to register before the Soviet authorities our sincere readiness to be fully law-abiding citizens of the Soviet Union, loyal to its Government, and definitely to hold ourselves aloof from all political parties or enterprises seeking to harm the Union.

[fol. 344] But let us be sincere to the end. We cannot be silent about the contradiction which exists between us Orthodox and the Communist Bolsheviks, who govern our Union. They set as their purpose struggle with God and His power in the hearts of the people. We on our part see the whole sense and whole aim of our existence in confession of faith in God and strengthening of the faith in the hearts of the people. They recognize only the materialistic interpretation of history, and we believe in the providence of God.

In spite of all this, we are convinced that the Orthodox Christian, sacredly observing his faith and living according to its precepts, for this very reason will be, always and everywhere, a desirable and exemplary citizen of any state, including that of the Soviets, in whatever area of life he is called upon to work: in the factory, in village or city, in the army or mine, etc. Should the state demand rejection of property, should it be necessary to lay down his life for the common good, should it be to show an example of temperance, honesty, earnestness in serving society—all this indeed the Christian is taught by his faith. In any case, since not only Communists but people of re-

ligious faith are citizens of the Union, in the leading ranks of these citizens must be found every Orthodox Christian, especially as the vast majority of the population is Orthodox.

The above is a declaration issued by Metropolitan Sergius on June 10, 1927, as quoted in "People, Church and State in Modern Russia", by Paul B. Anderson, published in 1944 by The Macmillan Company, at pp. 95-96.

[fol. 345] PLAINTIFF'S EXHIBIT 15-B

We conduct propaganda and shall conduct propaganda against religious prejudices. The laws of the country are such that each citizen has the right to confess any religion. This is a matter of conscience for each one. Exactly for this reason we carried through the separation of Church from the state and, proclaiming freedom of confession, we also preserved for each citizen the right to struggle against any religion by means of persuasion, propaganda and agitation. The Party cannot be neutral with regard to religion, and it conducts antireligious propaganda against any and all religious prejudices because it stands for science, while religious prejudices go against science, since every religion is something contrary to science. Such instances, as in America, where recently they condemned Darwinists, would be impossible with us, because the Party conducts a policy of complete upholding of science.

The Party cannot be neutral with regard to religious prejudices and will conduct propaganda against these prejudices because this is one of the sure methods of undercutting the influence of the reactionary clergy, supporting the exploitive classes and preaching subordination to these classes. The Party cannot be neutral with regard to the bearers of religious prejudices, with regard to the reactionary clergy, poisoning the minds of the toiling masses. Have we oppressed the reactionary clergy? Yes, we have oppressed them. The trouble is only that they are not yet fully liquidated. Antireligious propaganda is the means which must carry through to the end the work of liquidating the reactionary clergy. There are sometimes cases where Party members hinder the full development of anti-

religious propaganda. If such members of the Party are [fol. 346] rejected, that is very good, because there is no place for such "communists" in the ranks of our Party.

The above is a statement made by Stalin in his conversation with members of the First American Trade Union Delegation, September 9, 1927 (*Lenin: Izbrannie Proizvedenia,* Vol. I, 1939. 1901. Moscow) quoted at pp. 101-102 in "People, Church and State" by Paul B. Anderson.

PLAINTIFF'S EXHIBIT 16

THE PATRIARCHAL UKASE OF FEBRUARY 16, 1945

Russian Orthodox Greek Catholic Church of North America

59 East 2nd Street, New York 3, N. Y.

Approved St. Peter and Paul's day 1945, Metropolitan Theophilus.

RUSSIAN ORTHODOX GREEK CATHOLIC CHURCH OF NORTH America

To the Clergy and Lay People of the Russian Orthodox Church of America:

The Patriarchal Ukase of February 16, 1945

You have heard the news that the Bishops Council at Chicago on May 22-24, 1945, considered the Patriarchal Ukase of February 16, 1945, and decided that the terms proposed were not acceptable.

[fol. 347] In order that this decision may be understood in its proper perspective a discussion of the historical background and of the terms of the Ukase should be had.

Background

In 1924 the unity of the North American diocese was threatened, and the titles to its properties were endangered, by the attacks of John Kedrovsky, a representative of the schismatic group known as the Renovated Church.

That faction, which had attempted to seize control of church affairs in Russia and pretended to be the central church authority, had issued documents purporting to appoint Kedrovsky the Archbishop of the North American Diocese. A pseudo-Sobor, which had been convened by this group in 1923, declared "capitalism to be a mortal sin and a battle with capitalism to be holy to Christians". That "Sobor" also announced Patriarch Tikhon "unfrocked of his orders and monkhood". This schismatic group, if not actually created with the assistance of the Soviet government, certainly basked in its favor for a time. Most of the leaders of the Patriarchal Church had been killed, imprisoned or exiled, or had fled abroad. The American Church, by the very force of circumstances, had been cast adrift.

In this plight, the American Church had but one alternative, namely, to set up its own organization. The Sobor of the Russian Orthodox Church of America, held in Detroit in 1924 declared the Church self-governing, and decided:

> "* * * that it shall be governed by its elected Archbishop through a Council of Bishops, a [Metropolitan] [fol. 348] Council composed of persons elected from the clergy and laity, and through periodical Sobors of the American Church.
>
> * * * * * * *
>
> 4. Not to sever at all the spiritual ties and communion with the Russian Church, but always to pray for its welfare, give it complete cooperation, and to mention [in the services] the Holy Patriarch as the head of the Mother Russian Church to which the American Church owes its existence.
>
> 5. That the final decisions on the problems arising from the interrelations of the Russian and American Churches is left to a future legally called, legally constituted Sobor of the Russian Orthodox Church whose sessions shall be conducted with the participation of the representatives of the American Church under conditions of political freedom assuring fullness and authority to its decisions on behalf of the whole Church, and which [Sobor] shall be recognized by the whole

Universal Orthodox Church as a true Sobor of the Russian Orthodox Church.

* * * * * * *

7. To consider the present decisions effective until there shall be held a Sobor of the Russian Orthodox Church under the conditions set forth above in paragraph 5 which guarantee it freedom and validity, and until final agreement has been reached at that Sobor on the fate of the American Church."

[fol. 349] The American Church followed these declared principles and continued its activities as a self-governing body.

In 1933 the acting *locum tenens* of the Patriarchal Throne, Metropolitan Sergius, sent Bishop (now Exarch) Benjamin to this country. The Patriarchal Church, although not restored to its full rights, had made its peace with the Soviet government. In the name of the Patriarchate, the Exarch demanded from the American clergy a pledge of loyalty to the Soviet government. When the pledge was refused, Metropolitan Sergius laid a suspension upon the American Church. It was this act of suspension which broke off spiritual relationship between the two churches. The action was taken with no advance notice, without the preferment of charges and without permitting any opportunity to the American Church to be heard.

In 1934, upon the death of Metropolitan Platon, the American Church, at the Sobor in Cleveland, elected the present Metropolitan. Under his leadership, the American Church has grown and prospered. With trifling exceptions, the clergy and laity have remained loyal to the duly elected Metropolitan.

In 1937 the American Church, at the Sobor in New York, adopted the rules for the administration of the American Church under the name of Russian Orthodox Greek Catholic Church of North America. The Church was legally incorporated under that name. The bishops who had been sent here by the council of refugee bishops sitting in Yugoslavia acknowledged the jurisdiction of Metropolitan Theophilus and were assigned dioceses under him. In order to bring about this result and create harmony in the American Church, it was necessary for it to

[fol. 350] enter into a concordat with the Russian Churches of Western Europe, the Far East and the Balkans.

Beginning in 1941 when Hitler attacked Russia, an increasing amount of news about the Patriarchal Church was released from Moscow. It seemed, in form at least, that the mother church was being restored to a position of dignity and usefulness. Finally, friends of religion everywhere rejoiced to hear that, with the permission of the Soviet Government, a Bishops Council of the mother church had been convened and had named a Patriarch. Many people began to hope that the suspension which had been placed upon the American Church might be lifted. The clergy of the American Church mentioned again the name of the Patriarch of Moscow and All Russia in the divine services. When Patriarch Sergius died, the American Church sent a telegram of condolence to the *locum tenens* of the patriarchal throne. This telegram was courteously acknowledged on behalf of the Patriarchal Synod. The time appeared to be ripe for a discussion of the terms on which the two churches might be reunited. The subject began to be studied in the circles of the American Church.

Then, with no advance notice, came an invitation for the American Church to be represented at the All Russian Sobor to be held in Moscow on January 31, 1945. There was no time to convene an All American Sobor or even a Bishops Council to choose and instruct the delegates. Metropolitan Theophilus, after some consultation, appointed as delegates Bishop Alexy, Archpriest Joseph Dzvonchik, Secretary of the Metropolitan Council, Archpriest Nicholas Metropolsky, and Ralph Montgomery Arkush, Esq., a lay [fol. 351] member of the Church and the legal adviser of the Metropolitan Council. In the minimum time permissible for the issuance of passports, the granting of visas, completion of inoculations, etc., Bishop Alexy and Fr. Dzvonchik left New York for Moscow. The Soviet government provided the transportation from Alaska on. The other two delegates were to follow in a few days. Before they could leave, the Soviet government without warning cancelled the visa which had previously been granted to Attorney Arkush. The assigned reason was that entry into the Soviet Union for attendance or participation in the Sobor was permitted only to clerical persons. (It is

to be noted that a layman, an attorney, attended the Sobor from Yugoslavia and eighteen laymen attended as delegates from dioceses in the USSR.) Bishop Alexy and Fr. Dzvonchik, while midway across Siberia, after some delays, were informed that the weather required that they be transferred from their plane to a train. They arrived in Moscow ten days after the Sobor had adjourned.

The newly elected Patriarch and the Holy Synod received the American delegates courteously and hospitably. During divine services they stood within the sanctuary, not being invited to participate as clergymen in the ceremony. They presented to the Patriarch a written report on the conditions of church life in America and a written request for lifting of the suspension on terms of autonomy appropriate to the American district. No opportunity for discussion of any of these matters was given to the American delegates. Several days after they had presented their documents, the Patriarch summoned them to his presence [fol. 352] and read to them the Ukase of February 16, 1945, which had already been signed, sealed and numbered. The Patriarch asked them to deliver the Ukase to their Metropolitan and, without more ado, gave them his blessing.

Terms of the Ukase

In the light of this background, the terms of the Ukase may now be examined. The Ukase:

(a) Establishes a new metropolitan district, including parishes not now within the jurisdiction of the American Church, such as a few South American parishes, with a Metropolitan bearing the title of Patriarchal Exarch of All America and Canada;

(b) Calls for an All American Sobor to be convened, not later than the middle of the period between Easter and Pentecost [May 8-June 25], 1945, under the chairmanship of Archbishop Alexy of Yaroslav and Rostov;

(c) Requires the Sobor to express the decision of the American diocese to be reunited with the mother church;

(d) Requires the Sobor to declare the renunciation by the American Church of political activities against

the USSR and give corresponding orders to all the parishes;

(e) Provides that the Sobor by not less than two-thirds vote elect a Metropolitan and present the one chosen for confirmation by the Moscow Patriarchate; [fol. 353] (f) Recommends to the Sobor as candidates Metropolitan Benjamin and Archbishop Alexy, without limiting the Sobor in its right to nominate and elect its own candidate;

(g) Reserves to the Patriarchate the right to refuse confirmation of the chosen candidate if considered unsuitable for any motivated reasons whatsoever;

(h) Reserves to the Patriarchate the right to hear appeals by bishops and clergy from decisions of the American Church, to confirm candidates for bishop and to reward the clergy with higher titles, reserves other rights (unspecified) and intimates that the Metropolitan Exarch, together with the council of local bishops, may be given some extended powers by the Patriarchate.

Discussion

First and foremost it must be emphasized that the American Church considers itself as part of the Russian Church and desires that the suspension be lifted. It appreciates the courtesies which were extended to its delegates in the traditional Orthodox spirit. It ascribes greater importance to such Christian attitude of mutual dealing than to the technicalities to be observed in the lifting of the suspension. On the other hand, the tone and text of the Patriarchal Ukase disclose that the advisers of the Patriarch and the Holy Synod have little conception of the conditions of church life in this country, and of the atmosphere of religious and political freedom in which the American Church has developed.

[fol. 354] I

A New Metropolitan District

The establishment of a new metropolitan district is pointless. It is obviously a device for justifying a new election of a Metropolitan. The present district has existed, first as a mission, then as a missionary diocese, then as a dio-

cese and then as a metropolitan district, for more than a century and a half. The addition of a trifling number of South American parishes, or half a dozen or so parishes in North America that have never been included within the present district, is too insubstantial a change in the character of the district to warrant the thoroughgoing reorganization contemplated by the Ukase. Can it be, perhaps, that the Patriarchal Synod is not fully informed as to the statistics of the American Church? There is reason to believe that only recently the office of the Patriarchal Synod was not in possession of the information that the number of parishes in America which recognize the jurisdiction of Exarch Benjamin is 13. The number of parishes which recognize Metropolitan Theophilus is 358.

There is no reason for changing the name of the present district or the title of its head. These changes would create confusion as to property titles and other legal matters.

II

Convocation of an All American Sobor and Designation of Its Presiding Officer

The time prescribed by the Ukase for the convocation of an All American Sobor has now expired, so that no [fol. 355] mention need be made of the shortness of the period permitted for the preparation for such a Sobor. But even if that period were extended, and the regulations of the United States Office of Defense Transportation permitted, only imperative necessity would justify the holding of a Sobor under present war time conditions of travel and employment. Many active churchmen are in the armed forces. To discuss inflexible conditions which are obviously unacceptable is not a sufficient excuse for the convocation of a Sobor at this time. If reasonable conditions can be agreed on as the result of negotiation, a tentative concordat can be entered into by the Metropolitan with the approval of the Bishops Council and the Metropolitan Council and may be ratified by an All American Sobor when war time conditions have ameliorated.

The Ukase names the Archbishop of Yaroslav and Rostov to preside at the American Sobor. Under the rules for the administration of the Russian Church in America

adopted at the Sobor held in New York in 1937, an All American Sobor is convoked by and presided over by the Metropolitan. There is no canonical or practical reason why Metropolitan Theophilus should be displaced as the presiding officer of the Sobor when it is convoked.

III

Declaration of Renunciation of Political Activities Against the USSR

On October 10, 1944, the Council of Bishops of the American Church adopted the following resolution:

> [fol. 356] "The Council of Bishops finds it necessary to recommend to the clergy of the Metropolitanate, for the general welfare, not to touch upon political questions and not to make any public speeches on the subject, especially from the pulpit."

On the whole this recommendation has been meticulously followed. The American Church will hold to the same policy in the future. Nevertheless, the Russian Church in America exists in an atmosphere of religious and political freedom. Every citizen of the United States and of Canada has the right of freedom of speech. He may criticize his own government or any other government, so long as he does not go beyond certain limits which have been fixed by statute or decisions of the courts. It would be inconsistent with the duties and obligations of loyal American and Canadian citizens, and contrary to the traditional atmosphere of freedom of speech and political action in these countries, for the Russian Church in America to give the pledge of loyalty to a foreign power which is implicit in the demand of the Patriarchal Ukase.

IV

Election of a Metropolitan and Confirmation by Moscow Patriarchate

There is no present vacancy in the office of Metropolitan of the North American District. The addition of a few South American parishes, or North American parishes

not yet a part of the North American District, is too obviously transparent a device to justify the holding of a new election.

[fol. 357] Canonically and in accordance with the constitution of the mother church adopted at the Great Sobor held in Moscow in 1917-1918, the Patriarchate has the right to approve or disapprove the election of a bishop, but such right of veto cannot be exercised except on strictly canonical or moral grounds. Before requiring a new election, it is incumbent upon the Patriarchate to make charges against the present Metropolitan and to give him a fair hearing and trial of such charges.

The requirement of the Ukase that the vote for Metropolitan be by two-thirds "in accordance with American laws" appears to have no canonical or constitutional basis.

The recommendation by the Patriarchate of Exarch Benjamin and Archbishop Alexy as candidates appears to be without precedent in Russian Church history, even if there were any valid reason for holding a new election.

V.

Autonomy of the American Church

The Ukase mentions the possibility that "some extended powers" may be given by the Moscow Patriarchate. This, of course, is quite unsatisfactory. The precise nature of the relationship between the two churches should be defined in advance. This is particularly necessary in view of the precarious situation of the mother church, existing as it does by sufferance of a totalitarian regime.

The Ukase reserves to the Moscow Patriarchate the right to confirm candidates for bishop, the right to reward the clergy with higher titles, the right of appeal as regards bishops and clergy and other rights (not specified). The [fol. 358] right of appeal should be limited to bishops. Otherwise, every case of discipline of the clergy may involve an appeal to Moscow, a practice which could readily be abused and become ruinous to the organized life of the American Church.

The Russian Church in America should retain full autonomy with the possible exception of the right of appeal of bishops, the bestowal of the Holy Myrrh, the awarding of

higher titles to the clergy, communications with the other Orthodox Patriarchates and the right to veto the election of the Metropolitan or bishops (but only on strictly canonical or moral grounds and after full and impartial hearing).

In particular it should be provided that there be no interference from Moscow in the titles to American Church properties or American Church finances; the rules for administration of the American Church adopted at the New York Sobor of 1937 should remain in force except as expressly amended by future American Sobors; and the American Church of its own initiative should be privileged to take such steps as it may see fit looking toward the eventual formation of an autocephalous Orthodox Church in America subject to recognition by all of the Orthodox Patriarchs.

Conclusion

The American Church has sympathized with its mother church in all of her trials and tribulations. It has rejoiced in the privileges which have been recently accorded to her. But there must be further discussion and clarifi- [fol. 359] cation of the relationship between the two churches. Why was the American Church invited to send representatives to the Sobor of January, 1945? Was it so that they might attend the Sobor? Then why was the visa of the lay representative cancelled and why were the two clerical representatives who made the trip not permitted to arrive in time for the Sobor? Why were those representatives not given an opportunity to discuss the conditions of the Ukase but merely handed the completed document for delivery to Metropolitan Theophilus? It was an arduous journey for them to make if their function was only that of couriers. The Ukase might more economically have been brought here by Exarch Benjamin, who went to Moscow and was present at the Sobor.

The substance of the Ukase, as well as its tone and all of the circumstances leading up to and surrounding the issuance of the Ukase, suggest the high-handed methods of an autocratic bureaucracy. The American Church is flourishing in the atmosphere of democratic freedom. It was no fault of the American branch of the Russian Orthodox Church that by force of circumstances it was compelled to

establish its own church administration. It was no fault of the American Church that the Patriarchate laid a suspension on it because its clergy declined to give a pledge of loyalty to the Soviet power.

[fol. 360] It is an American Church and an American Church it must continue to be.

New York, July 10, 1945.

Faithfully yours, Most Rev. Theophilus, Archbishop of San Francisco and Metropolitan of Russian Orthodox Greek Catholic Church of North America, President, Rt. Rev. Makary, Bishop of Brooklyn, Very Rev. Theofan Buffetoff, Very Rev. John Kozitzky, Very Rev. Vasily Lisenkovsky, Very Rev. Joseph Dzvonchik, Secretary, Very Rev. Joseph Pishtey, Treasurer, Very Rev. John Telep, Joseph Lipko, Andrew Blaniar, Financial Secretary, Ivan Michaelson Czap, Michael Perhach, Rt. Rev. Alexy, Bishop of Aleutian Islands and Alaska, Comptroller, Very Rev. Alexander Kukulevsky, Comptroller, Rev. Dmitry Ressetar, Comptroller, Metropolitan Council of the Russian Orthodox Greek Catholic Church of North America.

[fol. 361] PLAINTIFF'S EXHIBIT 17

[Telegram]

The Most Holy Alexy
Patriarch of Moscow and All the Russias
Moscow USSR

Your Holiness at All American Sobor of Russian Orthodox Greek Catholic Church of North America held at Cleveland Ohio on November 26-29 1946 it was decided to request your Holiness to continue American Church in your fold and be our spiritual head under conditions preserving complete autonomy of American Church now existing with highest law making body remaining periodic All American Sobors at which Metropolitans are elected statutes of Church are adopted and life of Church is in all respects guided stop At same time it was decided to termi-

nate any administrative recognition of Synod of Russian Church abroad but to remain in brotherly and spiritual unity with all parts of Russian Church throughout world stop It is our pleasant duty to communicate these facts to your Holiness Official Minutes of Sobor have just been approved and are being forwarded to your Holiness for your information stop Your brother in Christ

Theophilus, Archbishop of San Francisco, Metropolitan of Russian Orthodox Greek Catholic Church of North America.

[fol. 362] PLAINTIFF'S EXHIBIT 17-A

Received Saturday, January 25, 1947, 3:45 P. M.

Metropolitan Theophilus, 59 East 2nd St., NYC

I have received your Eminence's telegram today stop I welcome decisions of Cleveland Sobor stop On Principle I have no objections against autonomy for our Orthodox Church in America Stop In peaceloving spirit I commission Metropolitan of Leningrad Gregory leaving for America in near future discuss all questions together with your Eminence stop God's blessing clergy and all flock stop From now on I consider your Eminence and all your clergy in unity of prayer with us celebrate service together with Metropolitan Benjamin in token of this communion stop Christ is with us and always will be stop

Patriarch Alexy.

[fol. 363] PLAINTIFF'S EXHIBIT 17-B

Text of cable sent January 31, 1947 to the Patriarch at Moscow:

This message of your Holiness has brought us great joy. We await from your Holiness an official Ukaz recognizing autonomy for our Church in North America as referred to in your Holiness' telegram to me. This may preclude necessity of sending Metropolitan Greogory to America as details can be completed by letters. However if your Holiness deems necessary to send Metropolitan Gregory to America I have no objections and hope everything will be decided peacefully for the good of the unity of the Church

Metropolitan Theophilus.

PLAINTIFF'S EXHIBIT 18

(Pursuant to stipulation this exhibit, which is an extract from the meeting of the Moscow Synod held on August 24, 1923, and appears in the printed Case on Appeal in *Kedrovsky* v. *Rojdesvensky* at pp. 556-558, fols. 1668-1672, is not printed.)

[fol. 364] PLAINTIFF'S EXHIBIT 18-A

(Pursuant to stipulation this exhibit, which is the certificate of appointment and consecration of John S. Kedrovsky as Archbishop of North America and the Aleutian Islands and appears in the printed Case on Appeal in *Kedrovsky* v. *Rojdesvensky* at p. 558, fols. 1673-1674, is not printed.)

PLAINTIFF'S EXHIBIT 19

(Pursuant to stipulation this exhibit, which consists of the Temporary Statutes of the Russian Orthodox Church Abroad, is not printed.)

DEFENDANTS' EXHIBIT A

Whereas, the 7th All American Sobor of the Russian Orthodox Church of North America having assembled in Cleveland, Ohio, on November 26-28, 1946, and having thoroughly considered the relations of our Church in America with the Patriarchal Church of Moscow and all Russia, and affirming our complete faith and loyalty to His Eminence, our elected, Metropolitan Theophilus;

Now therefore be it resolved, that His Beatitude Alexy, Patriarch of Moscow and All Russia be requested to continue us in his fold and be our Spiritual Head, conditioned upon the Church in America retaining its present autonomous status and the right of self government. That the periodic All American Sobors of the Russian Orthodox Church of North America shall remain the Supreme Leg- [fol. 365] islative and Administrative body of our Church; at these Sobors the Church shall continue to elect its own Metropolitan, and make and adopt its own laws by which the Church in North America is, in all respects, governed;

And whereas the Patriarchal authority is not consistent with the authority of the Synod of the Russian Orthodox Church Abroad, this Sobor does hereby

Resolve: That any administrative recognition of the Synod of the Russian Orthodox Church Abroad is hereby terminated, retaining, however, our spiritual and brotherly relations with all parts of the Russian Orthodox Church abroad;

And be it further resolved that in the event that the aforesaid conditions are found not to be acceptable to His Beatitude, the Patriarch of Moscow and all Russia, the Russian Orthodox Church of North America shall continue, and does remain, self-governing until such time as the Patriarch of Moscow and all Russia finds it possible to accept the conditions herein stated.

I, John Kozitzky, Secretary of the Metropolitan Council of the Russian Orthodox Greek Catholic Church of North America, do hereby certify that the foregoing is a true copy of the English text of a resolution which was duly adopted, in both English and Russian texts, by the All American Sobor of said Church, duly convened and held at Cleveland, Ohio, on November 26-28, 1946.

Witness, my hand and the seal of said Council, this day of April, 1947.

(Seal) John Kozitzky.

[fol. 366] DEFENDANTS' EXHIBIT B

(Pursuant to stipulation this exhibit, which is the Russion text of the ukase (no. 1005) of June 29, 1934 (see Defendants' Exhibit C), is not printed.)

DEFENDANTS' EXHIBIT C

Translation of Ukase of the Moscow Patriarchate

To His Eminence, Most Reverend Benjamin Fedchenkov, Archbishop of the Aleutian Islands and North America, Exarch of the Moscow Patriarchate in North America.

The Acting Patriarchal Locum Tenens and his Patriarchal Holy Synod, heard:

The facts concerning the refusal of Metropolitan Platon Rojdestvensky, governing our North American Diocese, to render canonical submission to the Patriarchate of Moscow in the person of the Acting Patriarchal Locum Tenens and the Holy Synod; also the declaration of the same Metropolitan Platon proclaiming the said Diocese Autocephalous;

And they referred to:

(I) The Decision of His Holiness the Patriarch and His Holy Synod, dated January 16, 1924, No. 28, as follows: "As we have data proving that the Metropolitan of North America has engaged in public acts of Counter-Revolution [fol. 367] directed against the Soviet power and of disastrous consequences to the Orthodox Church,—Metropolitan Platon will be dismissed from the government of the North American Diocese from the day on which this Present Decision is announced to him. (2) The choice of a candidate for the North American Episcopal See will be the object of a special discussion. It will be his duty personally to announce this Decision to Metropolitan Platon and

to take over from him all the Church property, governing the North American Diocese according to the special instruction which will be given him. (3) Metropolitan Platon will be invited to come to Moscow to put himself at the disposal of the Patriarch. (Signed) Patriarch Tikhon, Archbishop Tikhon (formerly of Ural), Archbishop Seraphim (now the Metropolitan of Kazan), and Archbishop Peter (now Metropolitan of Krutitsy and the Patriarchal Locum Tenens)."

(II) The Decision of the Acting Locum Tenens and the Patriarchal Holy Synod dated March 22, 1933, numbered 29, by which they (1) appointed His Eminence Archbishop Benjamin Fedchenkov to the position of Patriarchal Exarch in America to investigate the affairs of the Russian North American Diocese and (2) commissioned him to take over the government of the said Diocese upon the dismissal of Metropolitan Platon therefrom.

Thereupon, By their Decision of August 16th, 1933, Numbered 61, they decreed:

I. Consequent upon the already effected Decisions concerning the dismissal of Metropolitan Platon from the administration of the North American Diocese, and in [fol. 368] view of the Archbishop Benjamin's having entered upon the temporary administration of the said Diocese with his commission to organize the Diocesan administration according to the possibilities of local conditions—there should be final consideration by us concerning definitive arrangement of the administration of the North American Diocese after the receipt from His Eminence the Exarch of subsequent reports.

II. That we declare the proclamation of the North American Diocese as Autonomous by Metropolitan Platon in opposition to the will and without the consent of the Moscow Patriarchate (which is evidently, even by the acknowledgments of Metropolitan Platon himself, "the lawful Church Authority" for this same Diocese) to be an act rudely violating Church Discipline; and as such to count it null and void and to revoke it.

III. That we declare Schismatic (Raskolnicki) the religious group organized around Metropolitan Platon; that we declare the Diocesan administration and other organiza-

tions either existing now or which may be formed in the future in this group canonically illegal; and that we declare all their decisions concerning the Orthodox churches and concerning parishes in the Diocese, and in particular their ordaining and appointing Bishops and other Clergy and church officials, illegal and invalid.

IV. That Metropolitan Platon (Rojdestvensky), as the initiator and chief author of the schism created, be sum- [fol. 369] moned before the Court of Bishops and charged with violations of the 34th and 31st Canons of the Holy Apostles; the 14th and 15th of the Double Council; the first Canon of Basil the Great, and other similar Canons; and that meantime we place Metropolitan Platon under Prohibition from performing Divine Services until either he repents or the ecclesiastical Court shall have rendered a decision.

V. To propose to their Graces the Bishops and to the Priests and Church officials and to the Laymen who are in the North American Diocese that they, breaking off from communion with those who entered into schism, should express to the Patriarchal Exarch (in America)—or directly to the Acting Locum Tenens—(in Moscow) their submission to this present decision and their determination and promise in future to remain in the canonical jurisdition of the Moscow Patriarchate. The Acting Patriarchal Locum Tenens and His Patriarchal Holy Synod also heard:

The verbal proposal of the Acting Locum Tenens;—"His Eminence, the Exarch in America reports that he has organized in New York a Diocesan Council and that our North American Diocese has begun official existence. Therefore and in order to definitely settle the status of His Eminence, Archbishop Benjamin and his position in America, I consider it an opportune time to appoint him permanent Ruling Bishop of our North American Diocese, with all the rights and plenipotentiary powers which appertained to his predecessors in that see, assigning to him the title of Archbishop of the Aleutian Islands and North [fol. 370] America, reserving to him also the status of Exarch of the Moscow Patriarchate in America (in order that he may extend his jurisdiction over the Russo-Ameri-

can Dioceses and Parishes which lie beyond the boundaries of the United States), also to grant to him the right to wear the cross on the "Klobuk"; and by their resolution of November 22, 1933, Numbered 92, they

Decreed:

I. Concerning the appointment of Archbishop Benjamin Fedchenkev as permanent Ruling Bishop of the Russian North American Diocese with the title of Archbishop of the Aleutian Islands and North America, also reserving to him the status of Exarch of the Moscow Patriarchate in America, and also granting to him the right to wear the cross on his Klobuk; to accept with recognition as such.

II. The establishing, by His Eminence the Archbishop Exarch of a Diocesan Council of the structure indicated by him is confirmed, and about this it is resolved to send to His Eminence the Archbishop-Exarch a Decree for execution.

The present copy of this decree is sent to the Archbishop of the Aleutian Islands and North America, Exarch of the Moscow Patriarchate in America, Benjamin Fedchenkov, in order to register his relevant governmental institu-[fol. 371] tion in the United States, Canada and other countries of America.

No. 1005, June 29, 1934, (Zamestetl) Substitute or Representative, Keeper of the Records of Patriarchal Holy Synod Archpriest Alexander Lebedeff, Patriarchal Locum Tenens, Sergius M. of Moscow. (Seal).

January 27, 1936.

The Consulate General of the U.S.S.R. at New York hereby certifies the signature and seal on the above document and that this document is issued in accordance with the laws of the U.S.S.R.

Consul (Signature illegible), No. 380, (Seal).

(Stamps affixed)

The foregoing translation has been examined and compared with the Russian original and is hereby certified to be complete and accurate in all respects.

Alexander H. Carassó, Official Court Interpreter,
City Magistrates Courts, New York City (Seal).

[fol. 372] DEFENDANTS' EXHIBIT D

Decree of the Moscow Patriarchy, the Patriarch of Moscow and All Russia

Decision of the Most Holy Patriarch of Moscow and all Russia and the Holy Synod, of February 14, 1945.

The Most Holy Patriarch of Moscow and all Russia and the Holy Synod having examined the report brought to them by Bishop Alexy concerning the desire of the American Diocese to be reunited with the Russian Mother Church and concerning the project for the establishment of an American Church after this reunion—consider the following conditions of benefit to the church and canonically possible:

I. All the dioceses of North and South America, and also of Canada, make-up the Metropolitan District—an exarchate of the Moscow Patriarchy. The Metropolitan of this district, besides the title of his diocesan city, also bears the title of Patriarchal Exarch of all America and Canada.

II. No later than the middle of the period between Easter and Pentecost in 1945 an all American Orthodox Church Sobor is to be convoked, consisting of all the bishops, representatives of the clergy and laymen—of the present exarchate headed by Metropolitan Benjamin; as well as of the Metropolitan District, headed by Metropolitan Theophilus. The Archbishop of Yaroslavl and Rostov, Alexy, purposely sent to America by the Holy Patriarch of Moscow and all Russia, is to preside at the Sobor.

[fol. 373] III. The Sobor:

a) expresses the decision of the American orthodox dioceses to be reunited with the Russian Mother Church;

b) in the name of the American Orthodox Church declares its abstention from political activities against the U.S.S.R. and gives corresponding orders to all parishes;

c) in accordance with American laws (not less than a two thirds vote) elects a Metropolitan—head of the Metropolitan District and presents the one chosen for confirmation by the Moscow Patriarchy.

Note 1—On its part, the Moscow Patriarchy recommends to the Sobor as candidates the Metropolitan Exarch of all America and Canada—Metropolitan Benjamin, and Archbishop Alexy, without limiting the Sobor in its right to nominate and elect its own candidate to this post.

Note 2—To the Moscow Patriarchy belongs the canonical right to refuse confirmation of the chosen candidate if he be considered unsuitable by the Patriarchy, for any motivated reason whatsoever, to bear the title of Metropolitan and Exarch.

IV. In view of the distance of the American Metropolitan District from the Russian Mother Church and certain difficulties in contract, in comparison with other exarchates of the Moscow Patriarchy, the Metropolitan-Exarch, together with the Sobor of local bishops, may be given some extended powers by the Moscow Patriarchy, [fol. 374] but the right to confirm candidates for bishop, the right to reward the clergy with higher titles, and the right of appeal as regards bishops, clergy and others, remain with the Moscow Patriarchy.

V. In case of the acceptance of the above conditions by the Sobor of Bishops, headed by Metropolitan Theophilus, the suspension laid upon the American Church by the Moscow Patriarchy on January 4, 1935, is removed for the period (prior to the all American Church Sobor).

(signed) Patriarch of Moscow and all Russia Alexy,
The Administrator of the Affairs of the Moscow Patriarch, Archpriest Nicholas Kolchitsky.

Moscow, February 16, 1945, #94.

[fols. 375-377] DEFENDANTS' EXHIBIT F

(Order of the Supreme Court of the State of New York authorizing the transfer of St. Nicholas Cathedral and another property to Most Reverend Evdokim Meschobsky, Archbishop of Aleutia and North America of the Christian Orthodox Catholic Church of the Eastern Confession in North America—omitted in printing.)

[fol. 378] Enter, E. J. G., Justice of Supreme Court.

NEW YORK SUPREME COURT, NEW YORK COUNTY

IN THE MATTER

of

The Application of the RUSSIAN ORTHODOX ST. NICHOLAS CHURCH IN NEW YORK, to sell and transfer a portion of its real property.

To the Supreme Court of the State of New York:

The petition of the Russian Orthodox St. Nicholas' Church in New York respectfully showeth:

1. That the name of said corporation is "The Russian Orthodox St. Nicholas' Church in New York" and the names of the trustees and principal officers and their places of residence are as follows:

[fol. 379] (1) His Excellency, George Bakhmeteff, Ambassador Extraordinary and Plenipotentiary of Russia to the United States—Trustee and residing at Washington, District of Columbia.

(2) His Excellency, Michael Oustinoff, Consul General of Russia to the United States—Trustee, residing at No. 22 Washington Square North, New York City, New York.

That Section 50 of Article 3 now constituting Section 90, Article 5 of the Religious Corporations Law of the State of New York, provides:

"That a certificate of incorporation of an unincorporated Christian Orthodox Catholic Church of the Eastern Confes-ion shall be executed and acknowledged by the envoy extraordinary and minister plenipo-

tentiary, and the consul general of Russia to the United States, then acknowledged and received as such by the United States."

Section 51, Article 3 now constituting Section 91 of Article 5 of said law provides:

"The envoy extraordinary and minister plenipotentiary, and the consul general of Russia to the United States, acknowledged and received and such, and their successors in office shall, by virtue of office be the trustees of every incorporated Christian Orthodox Catholic Church of the Eastern Confession in this state."

II. That such corporation was formed under Section 50, Article 3 now constituting Section 90, Article 5 of the Religious Corporations Law of the State of New York, [fol. 380] and a certificate of incorporation was filed in the office of the Clerk of the County of New York, State of New York, on November 21, 1899, and that a copy of said certificate of incorporation is hereto annexed, marked "Petitioner's Exhibit A," and is made a part of this petition.

III. That the purposes of the said corporation and the scope of its activity, are set forth in full in the said certificate of incorporation (Petitioner's Exhibit A).

IV. That as such corporation it is the owner of the following described real property:

(Description of properties omitted in printing.)

[fol. 381] V. That the title to the properties of the Christian Orthodox Catholic Church of the Eastern Confession in North America, always was and now is by custom and practice, vested in the Archbishop of said Church, as trus-[fol. 382] tee for the said Church and its parishioners; that the present Archbishop of the said Christian Orthodox Catholic Church of the Eastern Confession in North America, is the Most Reverend Evdokim Meschersky, the properties and finances of the said Christian Orthodox Catholic Church of the Eastern Confession in North America are regulated and controlled by an unincorporated board, known as the North American Ecclesiastical Con-

sistory, consisting of five duly ordained clergymen of the said church over which the said Archbishop presides; that the said Archbishop holds the said properties in trust only for the uses and benefits of the church and its parishioners, subject to the authority and control of the said North American Ecclesiastical Consistory, that the said Christian Orthodox Catholic Church of the Eastern Confession in North America owns and controls numerous pieces of real estate throughout the United States, Canada, Alaska and the Aleutian Islands, and that in the great majority of instances the title to the said properties vests in the Archbishop in the manner hereinbefore set forth while the power regulating and controlling the said properties vests in said North American Ecclesiastical Consistory; that in the administration of the church affairs it becomes frequently necessary to sell, transfer or mortgage the said properties, that it is the usual procedure to have the Archbishop act upon the recommendation of the North American Ecclesiastical Consistory; that upon such recommendation the interest of the corporation will be promoted by the sale or transfer of the said real property as specified above, from said corporation to the Most Reverend Evdo-[fol. 383] kim Meschersky, in his capacity as trustee for said church and its parishioners, by such sale or transfer; that the North American Ecclesiastical Consistory will not be embarrassed in its action by delays or otherwise, in the event that it should become necessary to mortgage, transfer or exchange the said properties.

VI. That the two parcels hereinabove described are free and clear from any debts and incumbrances, except that Parcel No. 2 is uncumbered by mortgages amounting to $25,000, that the market value of the said parcels of real property of the within corporation is almost $185,000—and that the cash value of its personal assets is about $20,000.

VII. That no previous application has been made for the within order.

Wherefore your petitioner prays that an order of this court be entered giving it leave to sell or transfer the real property above described to the Most Reverend Evdokim Meschersky, in his capacity as trustee for the Christian

Orthodox Catholic Church of the Eastern Confession in North America.

Dated, March 27th, 1916.

G. Bakhmeteff, Ambassador Extraordinary and Plenipotentiary of Russia to the United States.
M. Oustinoff, Consul General of Russia to the United States.

[fol. 384] *Duly sworn to —. Jurat omitted in printing.*

[fols. 385-386] PETITIONERS' EXHIBIT A TO DEFENDANTS' EXHIBIT F

Certificate of Incorporation of the Russian Orthodox St. Nicholas' Church in New York. Filed and recorded in the office of the Clerk of the County of New York, November 21, 1899.

"We, the undersigned, Count Cassini, Ambassador of Russia, Waldemar Teplow, the Consul General of Russia to the United States, desiring to incorporate Russian Orthodox St. Nicholas' Church in New York as a Christian Orthodox Catholic Church of the Eastern Confession, in pursuance of Section 50 of the Religious Corporations Law, do hereby make, sign and acknowledge and file this certificate for such purpose as follows:

First: the name by which such church shall be known is Russian Orthodox St. Nicholas' Church in New York.

Second: The principal place of worship of the church corporation is to be located in the Borough of Manhattan, in the City of New York, State of New York.

In Witness Whereof, we have made, signed and acknowledged this certificate this 18th day of November, one thousand eight hundred and ninety-nine.

Count Cassini, Ambassador of Russia, Waldemar Teplow, Consul General of Russia."

(Acknowledgments omitted in printing.)

[fol. 387] NEW YORK SUPREME COURT, NEW YORK COUNTY

IN THE MATTER

of

The Application of the RUSSIAN ORTHODOX ST. NICHOLAS' CHURCH IN NEW YORK, to sell and transfer a portion of its real property.

CITY AND COUNTY OF NEW YORK, ss.:

Rev. Peter Kohanik, being duly sworn, deposes and says:

That he is 36 years of age and resides at 1425 Madison Avenue, in the Borough of Manhattan, City and State of New York, that he is the Secretary of the North American Ecclesiastical Consistory, a committee consisting of 5 duly ordained clergymen of the Christian Orthodox Catholic Church of the Eastern Confession in North America over which Committee the Archbishop of said church presides; that said Consistory exercises supreme authority over the conduct, property and finances of the said church in North America, subject only to the superior control of the Most Holy Synod at Petrograd, Russia; that uniformly the legal title to the properties of the said church in North America is vested in its Archbishop and held by him in trust for the use and purposes of the Christian Orthodox Catholic Church of the Eastern Confession and its parishioners, in [fol. 388] the manner outlined and recommended by the consistory.

That in the administration of affairs of said church, it becomes frequently necessary to transfer, sell, exchange, mortgage or otherwise dispose of the church properties, and very often on short notice; that the pieces of property mentioned in the Petition herein are actually owned and controlled by the Russian Orthodox Catholic Church of the Eastern Confession of North America, although the legal title thereto is vested in the petitioning corporation; that said pieces of property are located as follows: 13-15-17 East 97th Street and 1121 East 7th Street, in the Borough of Manhattan, County, City and State of New York; that the title to these pieces of property vests in the Russian Orthodox St. Nicholas' Church in New York, a religious

corporation duly organized on November 21, 1899, as your deponent is informed and believes; that said corporation is inactive, and so far, as your deponent knows, has never held a meeting or elected officers nor has it ever attempted to exercise any control or authority over said properties. Nor has it performed, so far as your deponent knows, any of the functions of a religious corporation; nor has it ever attempted to interfere in any way with the engaging or dismissal of the rector and his assistants, the choir singers or other administrative aids of said church, nor has it ever sought to exercise any control or authority over the management of the said properties.

That the North American Ecclesiastical Consistory has had actual control of the said properties since they were purchased by the said corporation; that it becomes frequently necessary to file Petitions with the Municipal au- [fol. 389] thorities of the City of New York, for the exemption of taxes, assessments, water rents and other penalties, and that at times the Consistory has been embarrassed and annoyed in its said applications because the title to said property is vested in the petitioning corporation; that it will promote the efficiency of the said Consistory in administering the said properties and it will avoid serious delays and embarrassments if the title to the said property were vested in the Archbishop, so that title to all the properties of the Russian Orthodox Greek Catholic Church would be vested in a single person.

That said corporation has no outstanding debts or obligations except that parcel No. 2 is encumbered by mortgages amounting to $25,000—leaving on both parcels an equity of about $160,000; that the rights and remedies of creditors will not be impaired by the transfer of said properties and that said conveyance will promote and conserve the objects of said church.

Rev. Peter Kohanik.

Sworn to before me this 27th day of March, 1916, Hugh G. Courtney, Commissioner of Deeds of the City of New York, County Clerk's No. 1179, Reg. No. 17085, Term expires October 26, 1917.

[fol. 390] NEW YORK SUPREME COURT, NEW YORK COUNTY

IN THE MATTER

of

The Application of the RUSSIAN ORTHODOX ST. NICHOLAS CHURCH IN NEW YORK, to sell or transfer a portion of its real property.

CITY, COUNTY AND STATE OF NEW YORK, ss.:

The Most Rev. Evdokim Meschersky, being duly sworn, deposes and says:

That he is 44 years of age and resides at No. 15 East 97th Street, in the Borough of Manhattan, City, County and State of New York; that he is Archbishop of the Russian Orthodox Greek Catholic Church in North America; that he has read the foregoing petition of the Russian Orthodox St. Nicholas' Church in New York and the affidavit of Rev. Peter Kohanik and that he verily believes that the statements therein contained are true; that by custom and precedent the title to the properties of the Russian Orthodox Greek Catholic Church in North America is vested in the Archbishop who holds the same in trust for said church and its parishioners; that the properties and finances of the said church are under the supervision and control of an unincorporated committee of 5 duly ordained clergymen of said church, known as the North American Ecclesiastical Consistory; over which committee the Archbishop presides; that the action of the Consistory in matters relat-[fol. 391] ing to the administration of the church and its properties is final and subject only to the superior control of the Most Holy Synod at Petrograd, Russia.

That in the administration of the affairs of the Russian Orthodox Greek Catholic Church in North America it frequently becomes necessary to transfer, exchange, sell or mortgage church properties sometimes on very short notice; when delays might prove both embarrassing and expensive; that while the title to the properties mentioned in the said petition has been and now is vested in the Russian Orthodox St. Nicholas' Church in New York the actual administration and control of said property has at all times been exercised by the said North American Ecclesias-

tical Consistory; that it will greatly add to the efficiency and expediency of the administration of said church properties to have the title to all the properties vested in the same person; that your deponent therefor respectfully submits that it will be to the best advantage of the Russian Orthodox Greek Catholic Church in North America to have the title to the properties in the petition herein mentioned, transferred from the said Russian Orthodox St. Nicholas' Church to your deponent, the Most Rev. Evdokim Meschersky, Archbishop of the Russian Orthodox Greek Catholic Church of North America.

Archbishop Evdokim Meschersky.

Sworn to before me this 27th day of March, 1916, Hugh G. Courtney, Commissioner of Deeds of the City of New York, County Clerk's No. 1179, Reg. No. 17085, Term expires October 26, 1917.

[fol. 392] Clerk's Certificate to foregoing paper omitted in printing.

[fols. 393-399] (Deed made April 12, 1926, to St. Nicholas Cathedral and another property by Russian Orthodox St. Nicholas Church to the Most Reverend Evdokim Meschobsky, Archbishop of Aleutia and North America of the Christian Orthodox Catholic Church of the Eastern Confession in North America—omitted in printing.)

[fol. 400] DEFENDANTS' EXHIBIT G

Russian Orthodox Church, Most Rev. Benjamin, Metropolitan of the Aleutian Islands and North America, Patriarchal Exarch in America, Diocesan Consistory, St. Nicholas Cathedral, 15 East 97th Street, New York, N. Y.

America, Karlovci, and Moscow; By Ralph Montgomery Arkush, Legal Advisor to the Metropolitan Council of the Russian Orthodox Greek Catholic Church of North America.

A break in the administrative relations between the Russian Orthodox Greek Catholic Church of North America, headed by Metropolitan Theophilus, and four of his bishops has been officially announced by the Bishops' Council and the Metropolitan Council of the Church. The hierarchs named are Archbishop Tikhon of Seattle and Western America, Archbishop Vitaly of Jersey City and Eastern America, Archbishop Ioasaf of Canada, and Bishop Ieronium of Detroit and Cleveland. (It is reported that recently Bishop Ieronim was promoted to the rank of Archbishop by action of the Munich Synod, taken without the approval of Metropolitan Theophilus.) For the time being the Metropolitan is taking on himself the duties of the four former diocesans. Plans for filling the vacancies permanently [fol. 401] are under way, an additional bishop having been recently consecrated [L. C., April 20th], and the consecration of a second bishop having been announced for May 11th.

The immediate cause of the rupture was the refusal of the four bishops to accept the decision of the All-American *Sobor* held at Cleveland on November 26-29, 1946. That body was convened for the express purpose of giving all of the 300 or more parishes in the Church, through their clerical and lay delegates, the opportunity of expressing their views on the relationship between the North American Church and the Moscow Patriarchate. It was the first All-American *Sobor* that had been held since 1937. Every parish delegation was given time to present its views to the assembly. The Metropolitan presided. All of the bishops, including the four above named, were present and most of the bishops participated in the discussion. The pre-*Sobor* Committee, which was in an advantageous position to control the proceedings to some extent, was headed by Archbishop Vitaly. Considerable criticism was heard among the delegates of the tactical advantages of the position: for example, the leading exponents of the view that

no connection should be had with the Patriarchate because of political conditions in Russia were given a preferred position on the agenda. The speeches made at the *Sobor* and the written declarations which had been adopted at parish meetings and were read to the *Sobor* reflected a wide divergence of views, from the bitter anti-Patriarchites to those who were for reunion with the Patriarch on any terms.

A separate but related question, which was of primary interest to the delegates, was that of the relationship be- [fol. 402] tween the American Church and the Russian Church abroad. On paper the American Church was a constituent part of the Russian Church abroad, the temporary statutes for the government of that body having been approved at the All-American *Sobor* held in New York in 1937. The connection, however, aroused little enthusiasm among the rank and file of the American clergy and laity.

The Diaspora

The organization of the Russian Church abroad was an attempt to unite in one body all parts of the Russian Orthodox Church outside of the Soviet Union. When civil war separated the dioceses in the southern part of Russia from the central Church administration, headed by Patriarch Tikhon, a temporary administration was organized in Stavropol. After the defeat of the White armies, four bishops who had been members of the Stavropol and of the Crimean Church administrations fled to Constantinople where they created a Bishops' Synod. Later they moved to Sremski Karlovci in Yugoslavia where they were taken under the protection of the Serbian Patriarch. At this time Europe was filled with Russian refugees and the effort of the Karlovci group to bring order into the ecclesiastical situation was justified. However, when the Karlovci Synod began sending bishops who attempted to set up a jurisdiction parallel to that of the Russian Orthodox Church then existing in America, the position of the Synod was indefensible. The Russian Orthodox Church of North America has had a continuous existence on this continent for over 150 years, first as a mission, then as a missionary diocese, then as a regular diocese, of the Russian Orthodox [fol. 403] Church, and finally as an autonomous body.

The administrative autonomy of the American Church was declared at an All-American *Sobor* held at Detroit in 1924, and was expressly based on the political conditions then existing in Russia. The language of the resolutions expressly preserved spiritual communion with the Patriarchate. This condition of autonomy was affirmed at the All-American *Sobor* held at Cleveland in 1934 when Metropolitan Theophilus was elected. The autonomous character of the American Church has been upheld by the civil courts and declared by statutes enacted by or now pending in the legislatures of a number of states.

The peace and unity of this self-governing body was broken by the arrival of four bishops sent by the Karlovci Synod, precisely the same four mentioned in the recent announcement. They succeeded in attracting to themselves or founding a very few parishes consisting mostly of the so-called "White" refugees. But, although attracting few followers, they constituted a source of confusion and unrest in the American jurisdiction. Accordingly Metropolitan Theophilus went to Karlovci in 1935 and agreed to the scheme of organization of the Russian Church abroad. This contemplated four metropolitan districts: North America, Western Europe, the Near East, and the Far East. The late Metropolitan Eulogius, who was to head the Western European district, also assented. His flock, however, refused to ratify, so that the district of Western Europe was placed under the jurisdiction of the Ecumenical Patriarch. This defection and the comparative paucity of Russian Orthodox parishes in other parts [fol. 404] of the world resulted in the North American district's being by far the largest component of the Russian Church abroad. The temporary statutes provided for an annual council of all the bishops of the constituent districts and for a permanently sitting bishops' synod consisting of one delegate from each district; the distant districts such as the North American and the Far Eastern might appoint as their delegates bishops residing in Europe. It was stipulated that the first president of the council and synod should be Metropolitan Anthony, formerly of Kiev and Galicia. At his death Metropolitan Anastasius became president.

Upon the signing of these temporary statutes the four

Karlovcian bishops in North America submitted to the jurisdiction of Metropolitan Theophilus, so that he, at least apparently, reaped the reward of his trip to Karlovci. The connection with the Karlovci Synod, however, was irksome and eventually, during World War II, became absurd. By reason of military or political conditions the existence of the Near Eastern and Far Eastern districts, or at any rate the connection of the Synod with those districts, was practically eliminated. A very few parishes in Western Europe, South America, and other parts of the world recognized the Karlovci Synod. Consequently, in practical effect, this Synod had become a mere paper superstructure on top of the North American Church. All sensible reasons for the continuance of this administrative connection had terminated. Nevertheless Metropolitan Theophilus loyally went through the form of submitting to Metropolitan Anastasius and his Synod, which eventually moved to Munich, the minutes of meetings of the Council of Bishops, the promotion of bishops to the rank of archbishop, etc. [fol. 405] One phase of the connection with the Karlovci-Munich Synod and the North American Church which caused almost universal resentment among the Church membership was the alleged political activity of members of the Synod or its staff. In the early days of the Synod prior to the organization of the Russian Church abroad various manifestoes issued from Karlovci indicating the hope for the restoration of the czarist regime. At a later stage it is alleged that persons connected with the Synod uttered expressions of a pro-Hitler character, although this charge has been denied. (At least it is certain that Archbishop Vitaly on his own responsibility joined in a telegram to President Roosevelt urging that the United States refrain from giving military assistance to the Soviet Union after the attack by Hitler.) The charges that the Karlovci-Munich Synod and its adherents have unjustifiably embroiled themselves in political activity have not endeared them more to the American Church membership.

Archbishop Alexy

Finally, when Archbishop Alexy of Yaroslav and Rostov came to this country in 1945-1946 he made it clear that a *sine qua non* of restoration of spiritual communion between

the American Church and the Moscow Patriarchate was the termination of the relationship with Metropolitan Anastasius. Whatever differences of opinion there were at the Cleveland *Sobor* last November on the exact nature of the relationship to the Patriarchate, there was only a minute fraction of the delegates who insisted on the continuance of a connection with Metropolitan Anastasius. [fol. 406] The vote of 187 to 61 which finally recorded the action of the *Sobor* is not a mathematical indication of the division of views on the question, since the resolution on which the vote was taken combined the questions of both the Patriarchate and the Russian Church abroad. Several resolutions in different form had been submitted to the assembly and many of those who voted against the resolution actually adopted did so in the expectation that if the resolution was defeated the prevailing sentiment of the meeting could be expressed in a different manner. For several days prior to the taking of the vote an attempt was made by the committee on resolutions and many of the leading delegates to prepare a resolution which would bring to an end the absurd situation in which the Munich tail was wagging the North American dog, but at the same time would provide a framework of Church government in which all of the Russian Church bodies outside of the Soviet Union and its sphere of influence would normally fit. Such a scheme was particularly suitable at the moment when many of the DP's and other Russian Orthodox people in Germany and Austria were being ministered to by bishops and priests of the Munich jurisdiction. A form of resolution to this end was reported by the committee on resolutions but never came to a vote.

The resolution adopted requested the Patriarch to continue as spiritual head of the American Church conditioned on the continuance of its administrative autonomy and terminated the administrative connection between the American Church and the Synod of the Russian Church abroad [L. C., December 8th]. Archbishop Vitaly and the three other Karlovcian bishops had and took the opportunity [fol. 407] of influencing the delegates to vote against this resolution. They raised no question as to the legal or canonical power of the *Sobor* to pass on the two questions

covered by the resolution until the results of the secret ballot had been announced. Only then did Archbishop Vitaly make a spirited protest.

The main body of Church membership, particularly the younger people whose influence is being more and more felt, and whose interest is indispensable to the life of the Church, are insistent that matters of vital Church policy are to be passed on in a constitutional and democratic fashion. The four bishops who have refused to concur in the decision of an assembly in the preparation for which and in the deliberations of which they actively participated have thereby repudiated the principle of constitutional and democratic church government. Their withdrawal from the Church will doubtless result in greater harmony in Church councils. It is believed that not more than 5 or 6 parishes at the most will follow them.

DEFENDANTS' EXHIBIT I

Memorandum on the Status of the Russian Orthodox Church in America

At the coming all-American Church Sobor in Cleveland, November 26 to 29, such decisions should be made, which, for a long time, will determine the destiny of the Russian Orthodox Church in America.

Fully conscious of the responsibility, placed on each member of the Church, for the universality of the church structure, the undersigned have placed herewith, in printed [fol. 408] form, our basic thoughts on the main question which today stands before our Church. They bring this memorandum at the present time, to the attention of the members of the coming Sobor, and to all Russian Orthodox people in America, in the hope that, by acquainting themselves with this memorandum, they will be aided in understanding the canonical status of our Church and thereby find ways for its proper development.

The canonical status of the Russian Orthodox Church in America, at the present time, is determined by two facts: the termination of administrative ties of this Church with the Moscow Patriarchate, which took place in 1933, result-

ing from the demand of the latter concerning loyalty to the Soviet government; and the subordination, in 1937, to the Russian Synod Abroad, on the condition that it remain a Metropolitanate District under the jurisdiction of the Russian Synod Abroad. At that time the Russian Synod Abroad had its permanent seat in the territory of Jugoslavia, as was definitely specified in the Temporary Status on administration of the Russian Orthodox Church Abroad, and operated with the blessing of the Serbian Patriarch. Resulting from this, the Synod, and through it, the subordinated Russian Orthodox Church in America, was in the necessary canonical communion with the Universal Orthodox Church.

Since then, the situation has changed altogether. During the war, the Russian Synod Abroad was forced to leave Jugoslavia, and at the present time has established itself in Munich. It no longer has the blessing of, and protection of the Serbian Church, and because of this, has lost ties with the Universal Church.

[fol. 409] From the Metropolitanate Districts under the Synod, two have gone under Moscow: the Far Eastern—excepting 20 parishes in the Shanghai Diocese; and the Near Eastern—excepting a few widely separated parishes. The third branch of this jurisdiction, composed of West European parishes, which submitted themselves to Metropolitan Serafim, suffered a heavy loss by submission to Moscow of the latter with a part of its parishes. This loss is not counterbalanced by formation of a line of new parishes in the English and American Zones of Germany, because these parishes, by their nature, are temporary and must close after re-settling the displaced persons beyond the borders of Germany, to which they persistently aspire. As a result, the only Church subordinated to the Synod Abroad, is the Russian Orthodox Church in America, with incidental additions.

Subordinating ourselves to this Synod, our Church, in substance, subordinates itself to a group of bishops, who really have no jurisdiction themselves. Because of this, some people are inclined to speak only of our cooperation with the Synod. This term "cooperation" however, is not correct, because the acts of 1936-1937 definitely subjugated our Church under the Synod Abroad.

The subjugation, at the present time, is shown by mentioning at services Metropolitan Anastasius as the presiding hierarch of the Russian Church Abroad in those instances, when, according to the rules, the head of the autocephalous Russian Church, the acceptance by our bishops of the elevation to the rank of Archbishop from the Synod, in confirming many honors upon the clergy of our Metro- [fol. 410] politanate District after receiving requests from us, in the oath of loyalty by the newly consecrated bishop for Alaska to the Synod, etc.

But, independent from this, whether our Church subjugates itself to the Synod, or only cooperates with it, the basic fact is, this: at the present time the Russian Synod Abroad has no canonical foundation, and any ties with it do not add to the canonical status of our Church. The existence of a branch of the Orthodox Church without communion with the Universal Orthodox Church is permissible only as a temporary status—for such a temporary independent status, separate dioceses of the Russian Church and groups were authorized by the well known decree of Patriarch Tikhon in 1920. A diocese or groups of dioceses may live and administer their affairs by this decree only when it can be shown that it is impossible to establish canonical validity.

For the Russian Orthodox Church in America, the most natural course towards rehabilitation is its return to a canonical subordination to the Mother Church of Russia, with which the American Orthodox people never wished to break their ties, always ready to spiritually participate in its service to Christ.

Such a return seemingly became possible following the Moscow Church Sobor in 1945 and the decree No. 94 of Patriarch Alexy on the stipulations and order in re-establishing canonical ties between the Patriarchate and the Russian Orthodox Church of America. We know also, of the difficulties which arose on the road toward realization of the Ukaz.

The difficulties may be defined by two facts. First—the indisputable nearness of the present higher hierarchy of [fol. 411] the Russian Orthodox Church, even though in no respect has it digressed from the dogmas of Orthodoxy, towards the Soviet government, expressed in many declara-

tions not only by the hierarchs but also by the chairman of the Committee on Russian Orthodox Church Affairs, Karpov. The second fact—the great majority of the members of the Russian Orthodox Church of America are American citizens and their organic ties with the political and public order, thus its roots differ from those accepted in contemporary Russia.

These two facts do not preclude any canonical subordination of our Church to the Moscow Patriarchy, but force us to insist on receiving for our Church a wide autonomy which would remove all influence of the Soviet government, direct or indirect, on our Church.

Some circumstances relating to the near past, demand extreme caution. For instance, the Moscow Patriarchate appointed Archbishop Foti of Orlov as assistant to Metropolitan Eulogius, who certainly could not have a clear understanding about the different conditions of church life in Russia and a democracy's, and for this reason he could not direct the church life of the Russian people, residing in Western Europe, in channels demanded by such conditions. This is shown vividly by the attempt of the Moscow Patriarchy, following the death of Metropolitan Eulogius, to appoint as his successor Metropolitan Serafim, not taking into consideration the wishes of the flock, nor the canonical rights of the Universal Patriarch.

Lastly, the St. Nicholas Cathedral in San Francisco, under the jurisdiction of Metropolitan Benjamin and through him the Moscow Patriarchate attempted to intro- [fol. 412] duce new parish by-laws, which was accepted by the Moscow Sobor in 1945, which almost abolishes the right of electing leaders, which was promulgated by the all-Russian Sobor of 1917-1918 according to an American standard which is in harmony with conditions of life in democratic America.

Besides, this reform is promulgated notwithstanding the fact that in the above-mentioned new parish by-laws was a reservation stating that the by-laws are not applicable in dioceses outside of Russia.

This is no place to draw up a project of full and detailed conditions of autonomy, which in its general form, is foreseen in the Patriarchal Ukase #94, which in substance needs explanation and addition. Demanding autonomy, we

do not mean autocephaly, that is, permission to organize a new, fully independent local Church. But this autonomy should go as far as the autonomy, enjoyed by the Churches of Estonia, Latvia, and Finland by decree of Patriarch Tikhon, and the Universal Patriarch, and similar to the autonomy of the West European Exarchate, headed by Metropolitan Eulogius within the jurisdiction of the Universal Patriarchate. The autonomous part of the local Church recognises as its spiritual head the first hierarch of the Mother Church, recognises his guidance in affairs of faith and sacraments, receives from him Holy Myrrh, and sent to him for his information accounts of its activities. But this autonomous part decides its own internal order, without interference of the Patriarchy, and selects its own first hierarch, allowing the Patriarchate the right to point out canonical impediments and, if any are pointed out, he may demand new elections. Recognising ourselves [fol. 413] canonically dependent on the Moscow Patriarchy, the Russian Orthodox Church of America should announce severance of its subordination to the Russian Syno[illegible] Abroad, although this severance should not prevent us fr[illegible] continuing to give material aid to the clergy and parishes, grouped around Metropolitan Anastasius, or from giving due credit for their valuable work in serving the spiritual needs of the Russian fugitives in Germany. The above-mentioned declaration is a logical basis for a sincere effort in re-establishing our canonical unity with Moscow, because, it is understood that our Church cannot at the same time be subordinated to Moscow and to the Church hierachy which assumes to represent the legal Russian Church. This assumption, so far, has not been supported by a single local Orthodox Church and for this reason does not give the Synod any ties with Universal Orthodoxy. In substance, this assumption canot be justified, because the Moscow Patriarchate has in no way digressed from the dogma, canons or the rites of Orthodoxy although adherence to a political line, for which it is often critjcized today, cannot be the deciding influence concerning its canonical status. It is permissible canonically, to give the Russian Orthodox Church of America that wide autonomy referred to above? It is undoubtedly permissible. Towards the end of 1943 Patriarch Sergius gave the Church

of Georgia not autonomy, but autocephaly, based on the fact that Georgia is a separate country with its own territory and government. The United States also is a separate country from the U. S. S. R. with its own territory and government, and if to a former part of the Russian Church, situated in a separate country, (although at the same time forming a part of the U. S. S. R.) was given [fol. 414] much more autocephaly, then it is understood, our church should get the lesser, that is, autonomy.

The second question is whether the Moscow Patriarchate will agree to give a wide autonomy to the Russian Orthodox Church in America, which is essential for its peaceful development. We fervently hope that it will agree. If, however, during the course of the negotiations it will become evident that canonical unity with Moscow cannot be re-established on these conditions, our Church will continue to live as a part, temporarily but only externally separated from the Russian Church, in the hope and a strong will for re-uniting as soon as this may become possible. Based on the reason set above, the following plan of action appears to be necessary:

(1) The Russian Orthodox Church of America at its Sobor expresses a strong wish to re-establish its canonical unity with Moscow, on condition of a wide autonomy and enters into negotiations towards this end.

(2) Until the time when the conditions of autonomy, acceptable to both parties, and acceptance by authorized organs, the Russian Orthodox Church of America continues in its present temporary independent status.

(3) The Russian Orthodox Church of America at its Sobor declares, that because of changed conditions, it recognizes the agreement with the Synod Abroad terminated and does not consider itself subordinated to the latter.

New York, Oct. 18, 1946.

Prof. M. Karpovich, Prof. G. Fedotov, Prof. N. Timashev, Peter Zubov, George Novitzky.

[fol. 415] DEFENDANTS' EXHIBIT J FOR IDENTIFICATION

NEW YORK SUPREME COURT, NEW YORK COUNTY

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA, *Plaintiff*,

against

JOHN KEDROFF, *et al.*, *Defendants*

The Case of the Missing Injunction

In response to Mr. Arkush's affidavit, I submit the following memorandum:

Plaintiff says that in June or July, 1926, it was temporarily enjoined, on Kedrovsky's motion, from interfering with his possession of the Cathedral. However, the original or even a copy of this injunction is unavailable, and Mr. Arkush in his affidavit seeks, in the latest who dunnit fashion, to reconstruct the terms of the missing injunction.

Needless to say, much of the affidavit is necessarily hearsay, conclusion and speculation—beyond the range of cross-examination. Nevertheless let us consider what Mr. Arkush's research comes to.

I have examined the file which Mr. Arkush has collected and it consists of (1) some letters, (2) some legal memoranda, (3) a copy of Kedrovsky's complaint against plaintiff, (4) a copy of the affidavits submitted by plaintiff in [fol. 416] opposition to Kedrovsky's motion and (5) miscellaneous papers. However, Kedrovsky's moving papers for the injunction were not in the file. Mr. Frink, who was Kedrovsky's attorney, is dead and his files are unavailable to me.

It appears that in an obvious (and I think unworthy) attempt to circumvent the judgment affirmed by the Court of Appeals in the *Kedrovsky* case, plaintiff purported to appoint one, Basalyga, who, I think, was one of its trustees, as alleged custodian of the Cathedral and he claimed that, since he was not a party in the *Kedrovsky* case, the judgment therein was not binding upon him. Plaintiff also brought a dispossess proceeding in the Municipal Court against Kedrovsky.

Kedrovsky then brought an action in this Court against plaintiff and its trustees to enjoin them from interfering with his possession of the Cathedral, sanctioned by the Kedrovsky judgment. That action, as the caption shows, was brought by him, "as Archbishop", and the acts complained of were that plaintiff and its agents (Par. 5 of his complaint) "have excluded and attempted to exclude" him from the Cathedral, and "have interfered and have attempted to interfere with his conducting religious services and other official activities" therein. The complaint made no mention of the Municipal Court proceedings.

Mr. Greaves, in his affidavit submitted by plaintiff in opposition to Kedrovsky's motion, stated that Kedrovsky "does not ask to stay or enjoin the Municipal Court proceedings".

Judge Mullan seems to have granted the motion for an injunction, but what are its terms? We don't know. If the counter-order which was not signed is a clue (as plaintiff seems to think) the injunction restrained plaintiff [fols. 417-425] "from interfering in any way with the occupancy" of the Cathedral by Kedrovsky or his agents "and from interfering in any way with his or their performing religious services and official activities on said premises".

As we have seen, the complaint alleged a *physical* interference with Kedrovsky's occupancy and use, and the injunction (if plaintiff's reconstruction be accepted) enjoins such *physical* interference. There is no injunction against bringing summary proceedings or ejectment. No such injunction was ever sought, as Greaves stated, *supra*, page 2:

[The foregoing exhibit consists of the first three pages of a memorandum submitted by the defendants' attorney in response to the affidavit of plaintiff's attorney (Plaintiff's Exhibit 7-C for identification.)]

(Opinion of Judge Botein, Trial Court, is omitted in printing. It is printed as Exhibit D to the Statement as to Jurisdiction.)

[fol. 426] IN SUPREME COURT OF NEW YORK

STIPULATION AS TO CERTAIN EXHIBITS DEEMED MARKED FOR IDENTIFICATION

It is hereby stipulated and agreed by the plaintiff and the defendants, through their respective attorneys, as follows:

1. The unsigned form of order appearing in the files of the Clerk of this Court in the action entitled "John S. Kedrovsky, as Archbishop of the North American diocese of the Russian Orthodox Greek Catholic Church and as delegate of the Holy Synod of said church, Plaintiff, against St. Nicholas Cathedral of the Russian Orthodox Church in North America, *et al.*, Defendants"; County Clerk's No. 21435/26, which was received in evidence and deemed marked Plaintiff's Exhibit 7 (Sten. Mins., p. 158) and later struck from the record (Sten. Mins., p. 203), shall be deemed marked Plaintiff's Exhibit 7 for identification.

2. The memorandum of Ralph M. Frink, Plaintiff's attorney, entitled "Memorandum on Settlement of Order" appearing in the Clerk's file of said action bearing file No. 21435/26 shall be deemed to have been offered in evidence at the trial on behalf of the Plaintiff, objected to on behalf of the Defendants as irrelevant and immaterial, excluded by the Court and marked Plaintiff's Exhibit 7a for identification.

3. The Affidavit of Ralph Montgomery Arkush, sworn to November 28, 1947, shall be deemed to have been offered in evidence at the trial on behalf of the Plaintiff, objected to on behalf of the Defendants on all grounds (but not be-
[fol. 427] cause of the failure to offer the oral testimony of the witnesses or the originals or whole of the documents therein referred to), excluded by the Court and marked Plaintiff's Exhibit 7c for identification.

4. The first three pages of the Memorandum of the Defendants' Attorney herein entitled "The Case of the Missing Injunction", submitted in response to the Affidavit of Arkush, above mentioned, shall be deemed to have been offered in evidence at the trial on behalf of the Defendants, objected to on behalf of the Plaintiff on all grounds (but not because of the failure to produce the oral testi-

mony of the witnesses or the originals or whole of the documents therein referred to), excluded by the Court and marked Defendants' Exhibit J for identification.

Dated: February 27th 1948.

Ralph Montgomery Arkush, Attorney for Plaintiff.

Philip Adler, Attorney for Defendants.

So ordered: B. B., J. S. C.

March 1, 1948.

[fol. 428] Supreme Court of New York, Appellate Division—First Department

Stipulation Waiving Printing of Certain Exhibits

It is hereby stipulated that the printing of Plaintiff's Exhibit 5, 6A, 13, 14, 15, 18, 18A and 19 and Defendants' Exhibit B be dispensed with; that said exhibits or copies thereof may be handed up to the Court by either party on the argument or submission of the appeal herein or, in the case of Plaintiff's Exhibits 6A, 18 and 18A, the Court may be referred to copies of said exhibits appearing in the printed Case on Appeal in *Kedrovsky v. Rojdesvensky* (opinion reported at 214 App. Div. 483) and that said exhibits and the contents thereof may be referred to by the parties in their briefs and upon argument as fully as though set forth in the printed Case on Appeal.

Dated: August 5, 1948.

Ralph Montgomery Arkush, Attorney for Plaintiff-Appellant.

Philip Adler, Attorney for Defendants-Respondents.

So Ordered: D. W. P.

[fols. 429-430] Stipulation and Order Settling and Filing Case—omitted in printing.

[fols. 431-432] Notice of Appeal to Court of Appeals—omitted in printing.

[fols. 433-434] Order of Affirmance of Appellate Division —omitted in printing.

[fol. 435] Judgment of Appellate Division—omitted in printing.

[fols. 436-489] (Opinions of Appellate Division omitted in printing. They are printed as Exhibit C to the Statement as to Jurisdiction.)

[fol. 490] Stipulation Waiving Certification in Court of Appeals—omitted in printing.

[fol. 491] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 492] IN COURT OF APPEALS OF NEW YORK

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA, *Appellant*, v. JOHN KEDROFF and BENJAMIN FEDCHENKOFF, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church, *Respondents*.

Decided November 30, 1950

Appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 25, 1950, affirming, by a divided court, a judgment of the Supreme Court in favor of defendants, entered in New York County upon a dismissal of the complaint by the court at a Trial Term (Botein, J.; opinion 192 Misc. 327) without a jury, at the close of the entire case.

Ralph Montgomery Arkush for appellant.

Philip Adler for respondents.

Conway, J. In 1903, a church was built at 15 East 97th Street in New York City, title to which was held by a corporation, created in 1899 under the Religious Corporations Law of this State and named "Russian Orthodox St.

[fol. 493] Nicholas Church in New York". The church was constructed with funds supplied partly from abroad and partly from local contributions and it was dedicated to the use of the members of the local congregation of the Russian Orthodox Church in New York City established in 1893. Two years later in 1905, the See of the Russian Orthodox Diocese of North America and the Aleution Islands was transferred from San Francisco to New York and St. Nicholas Church became a cathedral occupied by the ruling bishop of the North American Diocese and dedicated to the use of all the members of the diocese as a central place of worship of the Russian Orthodox Church in North America. This cathedral is the subject of the present controversy. Simply stated, it is our duty in this action to identify the true and proper beneficiaries at the present time of such dedication of the cathedral so that there may be proper administration of this religious trust. In approaching that task, it is vital to our inquiry that we understand the history and organization of the Russian Orthodox Church, and the origins of its difficulties in modern times as disclosed in the record here and the record in *Kedrovsky* v. *Rojdesvensky* (242 N. Y. 347), which was submitted to us upon the argument.

The Russian Orthodox Church is one of that loosely knit group which generically is referred to as the Eastern Confession or the Eastern Orthodox Church—an allusion to the rupture of the eastern and western portions of the Catholic church in 1054. The Russian church originally was subject to the Patriarch of Constantinople but acquired greater autonomy when Constantinople fell to the Turks and the Metropolitan of Moscow was no longer appointed by the Patriarch of Constantinople but was elected by the Russian bishops. Finally, express recognition of the "autocephaly", i.e., the complete independence, of the Russian church came in the 16th century when the Metropolitan of Moscow was raised to the dignity of Patriarch. The Patriarch ruled the church until 1700 when Peter the Great forbade the election of a new Patriarch and established the Most Sacred Governing Synod, consisting of a Procurator appointed by the Czar, and several metropolitans and bishops, to govern the church in place of the Patri-

[fol. 494] arch. This form of church government continued for over two hundred years, until 1917.

During that period, the Russian Orthodox Church conducted missionary activities in many parts of the world. A mission was established in 1793 in the then Russian territory of Alaska, and spread down the Pacific coast. In 1870, the mission had grown to the extent that the Diocese of Alaska and the Aleutian Islands was created with its See at San Francisco. Since it extended from Alaska through Canada to San Francisco, we shall refer to it herein as the North American Diocese or as the diocese.

A New York City congregation of the Russian Orthodox Church was established in 1893, incorporated in 1899, as already noted, and completed St. Nicholas Church in 1903. In 1905, when the See of the diocese was moved from San Francisco to New York, the church became a cathedral occupied, in accordance with the rules of the church, by the ruling bishop of the diocese. Throughout that period, the paramount jurisdiction of the Most Sacred Governing Synod in Russia over the North American Diocese was recognized and unquestioned.

Such was the condition of the Russian Orthodox Church and its North American Diocese until 1917—the year of the Kerensky revolution in Russia.

Following the overthrow of the czarist regime, a great "Sobor" or convention of the Russian Orthodox Church was called. This sobor of 1917-18, it is conceded here by all parties, had indisputable canonicity and validity. The sobor re-established the Patriarchate and elected thereto Patriarch Tikhon, the "arch-prelate" and "head of Church Administration", the first such since Peter the Great. The Patriarch, as the head of the Sacred Synod and of the Supreme Church Council, constituted the Supreme Church Authority and ruled the Russian Orthodox Church. Other enactments of the sobor provided a procedure for the local election of diocesan bishops and the confirmation of such election by the Supreme Church Authority. It also provided that the Patriarch might call a sobor every three years and that he should preside over it. [fol. 495] No sobor was ever called by Patriarch Tikhon (and he was the only one with power to do so) prior to his death in 1925.

Up to 1917, the ruling archbishop of the diocese had been appointed by the central church authorities. Tikhon himself, later to be Patriarch, was the diocesan archbishop from 1904 to 1907. Archbishop Platon succeeded him and ruled until 1914 when he returned to Russia and Archbishop Evdokim came in his stead. Archbishop Evdokim remained until 1917 when he too returned to Russia. All three duly appointed archbishops, in conformity with the rules of the Russian church, used and occupied St. Nicholas Cathedral, as their administrative headquarters and as a place of worship. Those three archbishops were in proper and direct canonical succession and as to that there is no controversy.

Archbishop Evdokim's departure in 1917 marked the beginning of the difficulties which have ever since beset the diocese. No discussion of the Russian Orthodox Church since 1917 is possible without constant reference to the political conditions upon which its character and its existence depended. In March of 1917, the Provisional Government of Kerensky replaced the czarist regime. The Kerensky Government itself was soon overthrown by the so-called Bolsheviki led by Lenin in the famous "October Revolution". Prior to his downfall, Kerensky, as noted, had authorized the convocation of the great sobor of the Russian Orthodox Church, which was in session through the latter part of 1917 and up to February of 1918 and which named Tikhon as Patriarch. Upon their accession to power, the Bolsheviki, in accordance with the then acknowledged and asserted principles of communism, attempted by every means at their command, to destroy religion in Russia. In the years following 1917, church property was confiscated, clergymen were killed, exiled or imprisoned, and Patriarch Tikhon himself, old and in poor health but a useful symbol, too valuable to be destroyed, was confined under house arrest and later imprisoned.

This frontal attack upon the church continued for five years. In November of 1920, however, at the height of the persecution, Patriarch Tikhon issued his now famous ukase No. 362 of 1920. This document contained "instructions to [fol. 496] the Diocesan Bishops for the case that a given Diocese be severed from the highest Church Administra-

tion, *or in case the latter's activity stop*". (Emphasis supplied.) It was provided in part that "if the highest Church administration * * * would for any reason discontinue their church-administrative activity", the diocesan bishop, either with the bishops of neighboring dioceses or, if that were not possible alone, should "assume the full hierarchical power" and "do everything possible to regulate the local church life, and if necessary, * * * organize the diocesan administration suitable to conditions created". Other paragraphs provided for the continuation of such local administration of the church if the discontinuance of activity of the highest church administration "should acquire a protracted or even permanent character". Finally, it was provided that "all measures taken locally in accordance with the present instructions * * * must be submitted for confirmation later to the Central Church Authority when it is re-established."

The apparent forebodings of Patriarch Tikhon, which prompted this ukase, proved accurate, for in the Spring of 1922 he was arrested and imprisoned. The Russian Government, then, for its own purposes, as later became evident, permitted a group of priests to visit Tikhon and they procured from him a letter authorizing the transfer of certain *business papers* of the church to a named archbishop (Agathangel) who was to be his representative. Instead of doing that, the recipients of the letter—members of a radical group styling themselves the "Living" or "Renovated" church—declared themselves to be the Supreme Authority of the Russian Orthodox Church and purported to authorize and summon the pseudo-sobor of 1923. Patriarch Tikhon later referred to them as "ambitious and willful men" who took advantage of the situation "to usurp the highest clerical power of the Russian Orthodox Church which did not belong to them," and he denounced their statements as "nothing but lies and deception". It is now conceded here that this was a schism which is now extinct. Nevertheless, while Tikhon was still in prison, this schismatic group purported to call another sobor of the church although power so to do resided only in the Patriarch [fol. 497] Tikhon, as we have seen. There is evidence that they were aided and abetted in their plan by the Russian Government which permitted them to proceed while

killing, arresting or exiling those members of the church who objected. This new pseudo-sobor met in 1923.[11] Tikhon was roundly and vehemently condemned by all the speakers. The patriarchate was dissolved and Tikhon, reviled and denounced as an apostate and traitor, was unfrocked. The church created by the pseudo-sobor of 1923 was called the "Living Church" or the "Renovated Church". It was schismatic and had no canonical validity. That fact, it should again be noted, is conceded by all the interested parties here.

The turmoil and the turbulence with which the Russian Orthodox Church was beset in Russia was not without its echoes in this country. Bishop Alexander of Canada became acting head of the diocese by designation of Archbishop Evdokim (see p. 3, herein). Several conventions were held in this country at which the status and fate of the North American Diocese were discussed and measures were proposed to preserve it from disintegration or the usurpation of pretenders. Archbishop Platon, who had ruled the diocese from 1907 to 1914, in proper canonical succession, returned to this country in 1921. He succeeded in restoring peace and order in the diocese, and prominent

[11] The minutes of its deliberations contain frequent obsequious expressions of praise of and devotion to the Soviet Government. Lenin was referred to as "the world's leader" and the Soviet Government was said to be "the only one in the world of all time of the existence of mankind, to fight actually for good and equality." A resolution was adopted which declared that the world was divided into two classes—the capitalist exploiters and the proletariat—and continued: "The Christians cannot be indifferent spectators of that battle. The Sobor declares capitalism to be a mortal sin, and a battle with capitalism to be holy to Christians. In Soviet Authorities the Sobor sees a world's leader for fraternity, equality and peace of nations. The Sobor stigmatizes the international and national counter-revolution and condemns it with all its religious and moral authority". Christians "through the entire world" were called upon to "bring into life the principles of the October Revolution."

churchmen of the diocese urgently petitioned Patriarch Tikhon to reappoint him formally as archbishop of the diocese. This was just before Tikhon was actually imprisoned. While he was technically at liberty, his visitors [fol. 498] in Moscow were being watched and interrogated carefully, and his correspondence, especially with Americans, was systematically searched. The American entreaties regarding Archbishop Platon were relayed to the Patriarch by a representative of the Y. M. C. A. who was in Moscow. The Patriarch, in the presence of another witness, Bishop Pashhovsky, assured him that Platon would be appointed the ruling bishop of the diocese and that he would issue papers to that effect. The Patriarch asked that Platon be notified immediately, but it was agreed that it would not be possible at that moment to put the appointment in writing because of the constant surveillance of the civil authorities and the fear that any such communication, if seized, would endanger the safety or the life of the Patriarch. The Patriarch's intention and will were transmitted to Archbishop Platon by the Y. M. C. A. representative and Bishop Pashhovsky. Alexander, the acting Archbishop, recognized in writing Platon's appointment as ruling bishop of the diocese, as did the bishops of the church outside Russia. Tikhon was imprisoned by the Soviet Government immediately after making this oral appointment. A diocesan convention was held at Pittsburgh in October, 1922, and after investigating the situation Platon was acknowledged as the ruling bishop. Platon accordingly took possession of St. Nicholas Cathedral and exercised administrative supervision over the diocese.

Patriarch Tikhon was released from prison in the latter part of 1923, after the pseudo-sobor of that year had completed its work. Under date of September 20, 1923, from a monastery, he signed an order directed to Platon advising him that, *with the concurrence of the Sacred Synod*, "having taken cognizance of the situation of the American Church, we deemed it necessary to appoint you to rule the North American Church."

Meanwhile, one John Kedrovsky, a priest of the Russian Orthodox Church in this country, had, in 1918, commenced an action in this State on behalf of himself and other priests against the association or corporation known as

the Archbishop and Consistory, which was a managing and advisory group handling the affairs of the diocese. In that [fol. 499] complaint Kedrovsky asserted that he was one of the clergy of the Russian Orthodox Greek Catholic Church of North America; that it was a religious denomination of about 300 churches with about 300,000 members organized in various unincorporated parishes or bodies throughout North America;[12] that his lawful archbishop was Archbishop Evdokim (Meschersky) who had departed from the United States for Russia about August 6, 1917, and had since remained there; that Alexander (Nemolovsky) was then a bishop of the church in Canada and had been assuming to act as the acting archbishop of the church pursuant to a cablegram from the lawful Archbishop Evdokim but that in truth no such appointment had been made by Archbishop Evdokim and that Alexander was therefore a usurper.

After the institution of that action, but before trial, the aforementioned *pseudo*-sobor of 1923 was held in Moscow. It created the "Living Church" or "Renovated Church", which, as noted, is now conceded to have been schismatic and uncanonical. Kedrovsky, the same priest who in his 1918 action had asserted that he was subject to Archbishop Evdokim as the true archbishop of the North American Diocese, procured from this "Renovated Church" certain credentials in the latter part of 1923. One document purported to consecrate him as North American archbishop and to excommunicate and condemn Archbishop Platon. The other documents contained Kedrovsky's formal appointment as archbishop of the North American Diocese and a full power of attorney to act for the church.

In March, 1924, he commenced another action, this time asserting that he was the lawful archbishop of the North American Diocese, in order to gain control of St. Nicholas Cathedral, the subject premises in the case at bar, which he

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[12] On the trial, he introduced in evidence an exhibit which listed deeds of 135 church properties to Bishop Alexander in Alabama, Alaska, California, Colorado, Connecticut, Illinois, Indiana, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Washington and Wisconsin.

then conceded had been possessed by Bishop Alexander in 1919 "as the de facto or acting Archbishop". As noted, Archbishop Platon was occupying the cathedral in 1924 by [fol. 500] ~~virtue of his~~ oral appointment by Patriarch Tikhon and the written confirmation thereof in September, 1923.

In March of 1924, immediately prior to the institution of the cathedral action by Kedrovsky, a document, dated February 16, 1924, appeared in the newspapers here purporting to have been issued by the Patriarch Tikhon accusing Platon of engaging "in Public acts of Counter-Revolution directed against the Soviet Power and of disastrous consequences to the Orthodox Church". It provided for the dismissal of Platon "from the day on which this Present Decision is announced to him", by a new ruling bishop who was to be chosen. The publication of this decree, dated less than five months after the patriarchal order confirming Platon and the legal action instituted by Kedrovsky, caused bewilderment among the members of the diocese. A North American sobor was called and held at Detroit in April of 1924 to consider the situation, excerpts from the minutes of which appear in the record.[13]

[13] The purported new order of the Patriarch was compared with his recent decree confirming Archbishop Platon, the language of the new order was analyzed and found to be couched in terms similar to those used by the schismatic Kedrovsky, and there were comments upon the very serious condition of the Patriarch's health. (He did, in fact, die the next year, in April of 1925.) It was concluded that "somebody in Moscow is extracting decrees from the sick Patriarch and is using those decrees against him", and in particular that the decree of February 1924, was "undoubtedly forced by the Soviet power". Another speaker stated: "The fact that the Soviet power still tolerates Patriarch Tikhon is only because he is an achievable means of influencing opinion at home and public opinion abroad. I have not the slightest doubt that all the Patriarch now does to administer the Patriarchate he is doing under duress. Over there it is done very simply: he is summoned to the respective commissariat and presented with decrees prepared beforehand which he is 'to execute'. As everything is done

It was pointed out that the North American Diocese, for a good many years, had been "cut off from the highest [fol. 501] organ of the administration of the Russian Church" and that that situation made operative the above-quoted ukase of 1920 providing for local administration and election of bishops. The sobor then adopted resolutions asking Platon to head the administration of the church. Another resolution emphatically stated it to be the will of the sobor "not to break at all the spiritual ties and communion with the Russian Church but always to pray for her good". The "final regulation" of the status of the North American church was to be left to "a future Sobor of the Russian Orthodox Church which will be legally convoked, legally elected, will sit with the participation of representatives of the American Church under conditions of political freedom, guaranteeing the fullness and authority of its decisions for the entire Church, and will be recognized by the entire Oecumenical Orthodox Church as a true Sobor of the Russian Orthodox Church."

The second or 1924 action brought by John S. Kedrovsky reached us two years before the 1918 action brought by him. In that 1924 action there was evidence as to most of the facts already detailed. However it was not there conceded as it is now that the "Renovated Church" had been schismatic in origin and had been later absorbed by or merged with the patriarchal church, nor that the 1923 sobor was not considered as having complied with canonical requirements because it was not convened pur-

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to 'consolidate the conquests of the revolution' his refusal to comply with the demands of the Soviet power will be openly called counter-revolution and sabotage." It was said that if such forced acts of the Patriarch continued, the North American Diocese would be subject to "all kinds of surprises, which could basically undermine that church order and peace which have, with such great labor, already been practically arranged" by Archbishop Platon, and "would involve our Church here in a condition of that same anarchy under the banner of which church life in Russia exists at present * * * We must create our own firm Church administration, completely insured against possibility of the direct or indirect influence of the Soviet Power."

suant to a cal by the Patriarch and the Holy Synod. Moreover, in that action there was not before the court ukasé No. 362 of 1920 of Patriarch Tikhon. The Appellate Division (214 App. Div. 483) stated that "The validity of Kedrovsky's appointment really depends upon the validity of the second Sobor [that of 1923] as it is called." (P. 487). It then found (contrary to what is now conceded to be the fact) that the sobor was properly called and that the "Renovated Church", created by it, had the [fol. 502] power to appoint Kedrovsky as the ruling bishop of the North American Diocese. When the appeal from that decision reached us we treated it as one involving only questions of fact as to whether (1) there was a governing body of the church and whether (2) that governing body had recognized Kedrovsky as archbishop of the church. We determined that there was evidence to sustain the findings of the Appellate Division on both of those points. We thereupon affirmed the judgment, one Associate Judge being recorded as absent. (*Kedrovsky* v. *Rojdesvensky* [1926], 242 N. Y. 547.) The control of all phases of Russian life by the Government was not as apparent in 1924 as it is a quarter of a century later and on the surface, at least, the case appeared to be a proper one for the application of the rule that in an ecclesiastical dispute involving a denominational church, the decision of the highest church judicatories will be accepted as final and conclusive by the civil courts (*Trustees of Presbytery of N. Y.* v. *Westminister Presbyt. Church*, 222 N. Y. 305, 315; *Watson* v. *Jones*, 13 Wall. [U. S.], 679, 724-727; Religious Corporations Law, §§ 4, 5.)

Two years later there was presented the original or 1918 action commenced by Kedrovsky, as a priest of the patriarchal church, on behalf of himself and all others similarly situated. It had been brought against the "Archbishop and Consistory of the Russian Orthodox Greek Catholic Church, alleged corporation", and others. Archbishop Platon (Rojdesvensky) was again an appellant. In that action a receiver *pendente lite* had been appointed and the judgment at Special Term directed that the defendant Platon and other defendants deliver over to such receiver, who in turn was directed to deliver to plaintiff

John S. Kedrovsky, all the properties and deeds thereto held by Bishop Alexander and conveyed by him to the general board of trustees by the exhibit dated June 7, 1921, which listed and enumerated all of the 135 church properties in the nineteen States and the territory of Alaska heretofore referred to. That judgment was unanimously affirmed by the Appellate Division. We, however, granted leave to appeal. The decision of the Appellate Division there was correct and unassailable if by our affirmance in [fol. 503] *Kedrovsky* v. *Rojdesvensky* (242 N. Y. 547, *supra*), we had adopted the view that the properties of the North American Diocese were required to be administered by an appointee of the central authorities of the patriarchal church as it then existed in Russia, whatever the status and characteristics of the church there might be, and that Kedrovsky had been validly appointed by such authorities. We, however, declined so to consider our earlier affirmance in the cathedral case two years before. Realizing that the legitimate claims of the North American Diocese, whose temporary autonomy had but recently been declared, were entitled to consideration under the circumstances disclosed, we unanimously reversed the judgments below. (*Kedrovsky* v. *Russian Catholic Church* [1928], 249 N. Y. 75.)

We pointed out that the title to the properties "was either in Archbishop Nemolovsky [Alexander] for the benefit of the faithful of the church within his diocese, or in the defendants [Platon and the general board of trustees] to whom he attempted to transfer his trusts * * *, or in the faithful of the church themselves." (p. 77.) We further noted that in none of those views was title in the members of the Consistory, then headed by Kedrovsky. Then, taking cognizance of the doubt as to Kedrovsky's status as archbishop by appointment of the "Renovated Church", and of the declaration of administrative autonomy by the American church at Detroit in 1924, we said (pp. 77, 78): "In view of the dissensions that have arisen, the Supreme Court may well conclude that the title should be vested in some other trustee who may be relied upon to carry out more effectively and faithfully the purposes of this religious trust (*Carrier* v. *Carrier*, 226 N. Y. 114).

Whether such trustee should be the plaintiff, who is the present Archbishop, or the incorporated Archbishop and Consistory, or some one else, we do not now determine. This question is one to be passed upon by the Supreme Court in its discretionary supervision of the conduct of trustees. That discretion has not been exercised by any judgment yet pronounced. * * *"

That 1928 decision by this court thus recognized that [fol. 504] the difficulties of the Russian Orthodox Church in this country differed substantially from the situations presented in the *Westminster* and *Watson* cases (*supra*), and that those cases were not helpful in the solution of the problem. The problem, indeed, was one which strained the limits of judicial power, and, we deemed it proper to return the case to the Supreme Court leaving it to that court, after full consideration of the facts, in the exercise of its discretionary power, to achieve a result whereby the faithful of the Russian Orthodox Church in this country might enjoy their accustomed religious temporalities under the supervision of trustees who might "be relied upon to carry out more effectively and faithfully the purposes of this religious trust".

While this litigation was in progress, the Soviet sponsored "Renovated Church" was the only one permitted to function in Russia, the central office of the patriarchal church being suppressed by the Government. Despite this State assistance, the "Renovated Church" had no popular following and few adherents outside its own clergy. In a few years it joined with and was absorbed by the patriarchal church. For two years, after Tikhon's death in 1925, there was no Patriarch of the Russian Orthodox Church. Then in 1927, one Sergius, the Metropolitan of Moscow, made peace with the Soviet Government and concluded an agreement with it under which the central office of that church was permitted to reopen, after acknowledging its "loyalty" to the Government and promising to secure similar written pledges of loyalty from the clergy of the church abroad. No election to fill the office of Patriarch was permitted. Instead, Sergius was appointed the acting *locum tenens* of the patriarchal throne. Unsuccessful discussions subsequently ensued with

a view toward reuniting the North American metropolitan district with the patriarchal church.[14]

Under the leadership of Metropolitan Platon following the creation of the administratively autonomous metropol- [fol. 505] itan district by the Detroit sobor of 1924, to which reference will be made hereafter, the church grew and prospered. With the exception of schismatics such as Kedrovsky, who was recognized by no one but who occupied St. Nicholas Cathedral by virtue of the decision and injunction of 1924, the North American church followed Metropolitan Platon. In 1933, the Acting *Locum Tenens*, Sergius, dispatched one Benjamin (Fedchenkoff) to the United States in order to take over the administration of the metropolitan district from Platon, whose proclamation of autonomy was declared to be "null and void". Sergius also purported to excommunicate Platon and all the clergy and laymen who followed him, until they submitted themselves to the jurisdiction of the patriarchal Exarch Benjamin (in America), or directly to the Acting *Locum Tenens* (in Moscow). Finally in 1934, Sergius appointed his ambas-ador, Benjamin, as "permanent Ruling Bishop of the Russian North American Diocese". The text of the order contains a recital that Benjamin had "organized in New York a Diocesan Council and that our *North American Diocese has begun official existence*". This would appear to be a significant admission that the former North American Diocese, which had by that time become a metropolitan district, had achieved practical administrative autonomy and that it was necessary for the Russian church to organize a new diocese. By 1945, the number of parishes which recognized the new diocese set up by Benjamin in 1934, and which we must assume, in view of the provi-

[14] The position of the Russian church in America appears to have been that no such pledge of loyalty to the Russian Government as demanded could be given by the clergy here and that the church in Russia was becoming a slave to the atheistic Russian Government and was aiding it in its fight against all religion. In view of those conditions, the Russian church here felt it had no alternative but to insist upon temporary autonomy envisaged by the ukase No. 362 of 1920.

sions of the Religious Corporations Law since 1875, were organized for the purpose of adhering to such new diocese set up by Benjamin, was only 13, while those adhering to the autonomous metropolitan district were said to total 358.

Platon died in 1934 and another sobor of the American church convened at Cleveland. Bishop Theophilus (Pashkovsky) was elected as ruling bishop and has served as such since. The temporary autonomy of the North Ameri-[fol. 506] can metropolitan district created in 1924 was re-affirmed, and rules for the administration of parishes were adopted. Another sobor at New York in 1937 again confirmed the temporary autonomy of the North American metropolitan district. The central church authorities in Moscow immediately issued a decree suspending and excommunicating Bishop Theophilus.

In 1934, John S. Kedrovsky, the schismatic, also died, but his son, Nicholas, continued to occupy the St. Nicholas Cathedral, even though by that time the "Renovated Church" had ceased to exist. Nicholas remained there until 1944, when he too died, and possession of the cathedral passed informally to his brother, John, who claimed to be a priest by virtue of an ordination of the "Renovated Church".

In 1940, the status of the metropolitanate again came before this court in *Waipa* v. *Kushwara* (259 App. Div. 843, motion for leave to appeal denied 283 N. Y. 780). That was a suit to oust a priest from a Russian Orthodox Church in Yonkers, N. Y. He had been suspended by Archbishop Theophilus of the metropolitan district and in the civil action brought against him, he defended on the ground, among others, that Benjamin, the appointee of the Moscow Patriarchate and not Archbishop Theophilus, the elected metropolitan, had the power and authority to administer the affairs of the church here. The lower courts rejected that contention, finding authority for the creation of the administrative autonomous metropolitan district in the ukase of 1920 of Patriarch Tikhon which was to continue "until such time as the existing civil authorities * * * would cease interfering with the church". (N. Y. L. J., Jan. 6, 1940, p. 97, col. 5.) We denied leave to appeal.

Following the invasion of Russia by Germany in 1941,

the Soviet Government, fighting for survival, apparently found it expedient to permit a somewhat broadened area of activity to the Russian Orthodox Church in that country. Then, following the death of Sergius in 1944, it consented to the convening of a sobor at Moscow in January of 1945. The news which was permitted to seep out of Russia after 1941 encouraged the hope in the members [fol. 507] of the metropolitan district that unity might again be found.[15]

Suddenly, without advance notice, an invitation was received for the North American church to be represented at the new sobor in Moscow. Four delegates were hurriedly chosen—three clergymen and one layman, the attorney for the church—who made preparations to travel to Alaska, from which place the Russian Government was to provide transportation to Moscow. After two of the clergymen had started, the Soviet Government cancelled the visa of the attorney on the pretext that entry was permitted only to clerical persons—a restriction which was not observed with reference to the delegation from Yugoslavia. The two clergymen who had already left were met by a Russian airplane which was to carry them to Moscow. Instead, they were landed in Siberia and transferred to a train to continue their journey. As a result, they arrived in Moscow ten days after the sobor had adjourned.

They found that one Alexy had been named Patriarch of the Russian Orthodox Church, and they presented to him a report of the church in North America and a request for the lifting of the spiritual separation on terms of autonomy. In return, they were handed a prepared document, the so-called ukase of February, 1945, for delivery to Metropolitan Theophilus. The terms of this ukase were not acceptable to the North American church. Instead of the necessary autonomy, the ukase provided for the calling of a sobor in America to be presided over by an archbishop sent from Russia. The sobor was to be required

[15] As stated in an official report of the metropolitan district, "It seemed, in form at least, that the mother church was being restored to a position of dignity and usefulness. * * * The time appeared to be ripe for a discussion of the terms on which the two churches might be reunited."

to declare in the same of the church "its abstention from political activities against the U. S. S. R. and give corresponding orders to all parishes". There was no comment or provision concerning the status of Metropolitan Theophilus, the elected head of the North American church. Instead, the sobor was to be required to elect a new person [fol. 508] to be head of a new metropolitan district. Two representatives of the then Moscow Patriarchate were recommended as candidates for the position, and the right was reserved to refuse confirmation of the person chosen "if he be considered unsuitable by the Patriarchy, for any motivated reason whatsoever". There was an intimation that "some extended powers" might be given to the person so chosen and confirmed, "but the right to confirm candidates for bishop, the right to reward the clergy with higher titles, and the right of appeal as regards bishops, clergy and others, remain with the Moscow Patriarchy."

A council of the bishops of the North American metropolitan district met in May, 1945, and decided that the terms proposed in the ukase of February, 1945, were not acceptable.[16]

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[16] In an official report to the clergy and laymen, published in July, there was a full discussion of the background and necessity of the 1924 declaration at Detroit of temporary autonomy for the North American metropolitan district. Reference was made to the recent efforts at unity, the chicanery by which the American delegates were prevented from attending the Moscow sobor, and the substance of the ukase then issued. The report emphasized that the metropolitan district considered itself as part of the Russian church and desired that the suspension be lifted. It was pointed out, however, that the text of the ukase disclosed that the Moscow patriarchate had "little conception of the conditions of church life in this country, and of the atmosphere of religious and political freedom in which the American Church has developed." Then followed a point-by-point analysis of the ukase. One of the major obstacles was the insistence of the patriarchy upon renunciation of political activities against the U. S. S. R. The report said: "It would be inconsistent with the duties and obligations of loyal American and Canadian citizens, and contrary to the

The attempts at reconciliation having met with failure, the metropolitan district decided to commence this action to recover possession of St. Nicholas Cathedral, which by [fol. 509] custom and rule had always been the See of the Russian Orthodox Church in North America and the residence and place of worship of the ruling bishop of the church in North America. Technically, the plaintiff in this action is the corporation, "Saint Nicholas Cathedral of the Russian Orthodox Church of North America". When the land for the proposed cathedral was acquired in 1899, title was taken in the name of a religious corporation organized pursuant to the Religious Corporations Law of 1895 (L. 1895, ch. 723, § 50) which provided that the incorporators of such Orthodox churches should be, by virtue of office, the Russian Ambassador and the Consul-General. This corporation, so formed, retained title until 1925, with the exception of one year (1916-17) when title was temporarily placed in the name of the then ruling Archbishop Evdokim to whom John S. Kedrovsky, when he brought his 1918 action, was subject as a priest and whom, he in his complaint, recognized as the true head of the North American Diocese.

In 1925, a special act of the New York State Legislature (L. 1925, ch. 463) created the plaintiff corporation, composed of Metropolitan Platon and others of the metropolitan district, to which the old or 1899 corporation transferred the cathedral property. The deed was signed by the Russian Consul General, but not by the other statutory incorporator, the Russian Ambassador, as we did not then recognize the Russian Government in that country. That

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traditional atmosphere of freedom of speech and political action in these countries, for the Russian Church in America to give the pledge of loyalty to a foreign power which is implicit in the demand of the Patriarchal Ukase." Another stumbling block was the vagueness of the ukase as to the powers of the North American church. It was felt that "the precise nature of the relationship between the two churches should be defined in advance. This is particularly necessary in view of the precarious situation of the mother church, existing as it does by sufferance of a totalitarian regime."

necessary defect was cured, and all such deeds validated by a subsequent act of our Legislature. (L. 1942, ch. 206.) Moreover, the corporate existence of the plaintiff corporation was specifically confirmed by still another act of our Legislature (L. 1945, ch. 817), "notwithstanding any non-user by said corporation of its corporate rights, privileges and franchises or the lapse of any period of time during which said corporation was inactive." The plaintiff corporation, accordingly, is the present owner of the record title to St. Nicholas Cathedral. This is not, however, the ordinary ejectment action, in which proof of such title and of an ouster would constitute ground for relief. Since 1875 (L. 1875, ch. 79) our Legislature has provided for the denominational control and administration of church prop-
[fol. 510] erties a... temporalities. (See Religious Corporations Law, § 5.) The corporate owner of the title thus holds the property *in trust* for the religious body for whose use it was dedicated. Plaintiff does not dispute this trust theory, but on the contrary relies upon it. Plaintiff has endeavored to prove that the beneficial use of the property today rightfully belongs to the Russian church in America (Religious Corporations Law, § 105) which was forced to declare its administrative autonomy at the Detroit sobor of 1924 in order to preserve and adhere to those principles and practices fundamental to the Russian Orthodox faith, free from the influence of an atheistic and antireligious foreign civil government.

The action, as stated, was commenced against John Kedroff, the second son of John S. Kedrovsky, in April, 1945. Apparently fearful of his anomalous status, as a cleric of a concededly extinct church (the "Renovated Church"), Kedroff made overtures to Benjamin, the representative of the Moscow Patriarchate, and in October, 1945, was *reordained* by Benjamin and thereupon surrendered the cathedral premises to Benjamin, as head of a new diocese of a different church.

We must remember that Benjamin never possessed or occupied the cathedral until after the commencement of this action on April 9, 1945, against the defendant Kedroff. Benjamin was not originally a party herein because he was not an occupant of the cathedral but was later permitted to intervene. Kedroff, the second son of Kedrov-

sky, was but a priest of the schismatic "Renovated Church" and thus could not have defended this action as an occupant of the cathedral. He therefore went to Benjamin, recognized him as the "Chief Church Authority", and said "Ordain me all over again" and had himself reordained as a priest by Benjamin in what must have been the latter's new diocese. When Benjamin did so reordain Kedroff as a priest, the latter "gave" the cathedral to Benjamin according to Benjamin's counsel here. Thereafter, in order to obtain an adjournment in this action, Benjamin stipulated to and did give up possession of the cathedral on June 6, 1947. At the time of the trial, when he was called by the plaintiff *only*, Benjamin was living [fol. 511] at 38 Halsey Street in Brooklyn. Benjamin was therefore an occupant of the cathedral only from October, 1945, a time subsequent to the commencement of this action, until June 6, 1947.

Kedroff had interposed a general denial to plaintiff's complaint. After Benjamin, following such surrender by John Kedroff, took over the cathedral, he was permitted to intervene and interposed the present amended answer setting up four affirmative defenses. Only the first need concern us here. The second, third and fourth defenses, i.e., nonuser and lack of authority in plaintiff, the Statute of Limitations and laches, respectively, were either ignored, abandoned or found in plaintiff's favor below. There was little or no discussion concerning them and they have been effectively eliminated from the case. The first affirmative defense sets up Benjamin's appointment and his asserted right to occupy the cathedral by virtue of such appointment to that office.

Before this action was commenced a new article of the Religious Corporations Law, 5-C, was passed by both houses of the New York Legislature. It was subsequently signed by the Governor. This legislation had a conclusive effect upon the issues presented in the case at bar and will be discussed at length below. Quite apart from this legislative action with respect to the specific dispute here involved, we think that, as a matter of common law as intimated by our 1928 decision in *Kedrovsky* v. *Russian Catholic Church* (245 N. Y. 75, *supra*), there was ample basis and room for an exercise of the discretionary power

of the Supreme Court over the conduct of trustees, in favor of the North American metropolitan district. We think that in the light of historical facts and the evidence in the records before us, the conclusion would have been fully warranted that the leaders of the North American metropolitan district are the trustees "who may be relied upon to carry out more effectively and faithfully the purposes of this religious trust" (pp. 77-78), i.e., who may administer the temporalities of St. Nicholas Cathedral for the benefit of the faithful for whose use it was originally dedicated.

The courts below, in granting judgment herein to de- [fol. 512] fendants, did not determine, in the exercise of their discretion, whether defendants could be relied upon to carry out faithfully and effectively the purposes of the religious trust. The *Westminster* and *Watson* cases (*supra*), were cited and the conclusion drawn that St. Nicholas Cathedral must be occupied by an archbishop appointed by the central authorities in Moscow and that Benjamin, who was so appointed, was therefore, entitled to the possession of the cathedral. This, we think, was error. The determinative issue in the case, apart from the action of the Legislature with respect to the problem, was whether there exists in Moscow at the present time a true central organization of the Russian Orthodox Church capable of functioning as the head of a free international religious body. If the Moscow patriarchal throne has been resurrected by the Soviet Government solely as a means of influencing opinion at home and abroad, and if it may now operate on an international scale, not as a true religious body, but only as an extension or implementation of Russian foreign policy, then it is clear that the North American metropolitan district and not the appointee or ambassador of the central authorities in Moscow, is the proper trustee to manage for the benefit of the faithful in this hemisphere those religious temporalities dedicated to the use of the Russian Orthodox mission and diocese prior to 1924 when it became an administratively autonomous metropolitan district. (Religious Corporations Law, § 105.)

We know that a nominal church organization exists in Russia, but that is not enough. We are told—by the *only*

witness called by the defendants and one who supplied the *only* testimony to this effect—that "from 1925 to date, the church has received greater liberty and is functioning freely as an orthodox church, without interference by the civil authorities, and the political views held by the authorities, *and any atheistic sentiment that they may have in no way interferes* with the unhampered activities of the Russian Orthodox Church." On the other hand, plaintiff urges that, willingly or not, the Moscow patriarchy is unable to conduct "church-administrative activity" except as an arm of the Russian Government to further its domestic and foreign policy; that that is a fact publicly recognized [fol. 513] by our President and our State Department; and that it is attested to and demonstrated in the records submitted to us by (1) the imprisonment of Patriarch Tikhon, (2) the suppression of the patriarchal church during the days of the State-supported schism of the "Renovated Church" and (3) by the later re-establishment of an enfeebled patriarchate, when the "Renovated Church" had served its purpose, willing to pledge its loyalty to the Russian State and to attempt to exact a similar pledge from clergy abroad. Having in mind the warning of Lord COLERIDGE, in *Lumley* v. *Gye* (2 El. & Bl. 216, 267), "Judges are not necessarily to be ignorant in Court of what everybody else, and they themselves out of court, are familiar with", we feel we must accept the historical statements contained in the dissenting opinion of Mr. Justice VAN VOORHIS below: "* * * In recent public pronouncements the State Department, and our representatives in the United Nations, have frequently recognized and denounced the suppression of human rights and basic liberties in religion as well as in other aspects of life, existing in Soviet Russia and in all of its satellite states. The President of the United States has publicly characterized such efforts as a campaign to turn religion into a tool of the state (Armistice Day Address, November 11, 1949)." (276 App. Div. 309, 330.)

Everyone agrees that the Russian Orthodox Church has continuously existed down through the centuries, for no communicant would concede that the suppression of the church by the Soviet Government had ever destroyed the

patriarchy as a *spiritual symbol* of the spiritual unity of the Church as distinguished from its temporalities. Moreover, members of the North American metropolitan district admittedly revere and respect the *office* of the patriarchy, whatever may be their feelings as to the merits of the current incumbent of the office. This devotion is traditional and serves as a common bond for the members of the *Russian* Orthodox Church, as distinguished from the members of other Orthodox churches in various countries which have recognized as their spiritual heads at various times the Patriarchates of Constantinople, of Alexandria, of [fol. 514] Antioch, of Serbia and of Jerusalem. Recognition of the Moscow patriarchy by the North American metropolitan district in that sense is by no means a disavowal of the position steadfastly maintained by it down to the present day, viz., that the beloved patriarchy has been absorbed by the Russian Government and its action deprived, during the period of such domination, of any religious significance.

In short, we think that further inquiry might well have been made into the present status of the patriarchate in Russia and we think the Supreme Court should have determined, in the exercise of its discretion, whether Benjamin, the appointee of the central church authorities in Moscow, or Metropolitan Theophilus, the archbishop of the North American metropolitan district, was the proper person to administer the temporalities of St. Nicholas Cathedral and whether he was the proper trustee "who may be relied upon to carry out more effectively and faithfully the purposes of this religious trust (*Carrier* v. *Carrier*, 226 N. Y. 114)." (*Kedrovsky* v. *Russian Catholic Church*, 249 N. Y. 75, 77-78, *supra*.) That was not done because it was thought that the cases of *Watson* v. *Jones* (13 Wall. [U. S.] 679, *supra*), and *Trustees of Presbytery of N. Y.* v. *Westminster Presbyt. Church* (222 N. Y. 305, *supra*), required a decision in favor of defendants and that the earlier case of *Kedrovsky* v. *Rojdesvensky* (242 N. Y. 547, *supra*), was determinative of some phases of the problem. Our views on this aspect of the controversy would require reversal and the ordering of a new trial so that the Supreme Court might exercise its discretion along the lines herein indicated. It is unnecessary, however, to discuss that further,

for there is another ground requiring reversal here and judgment in favor of the plaintiff and the North American metropolitan district which it represents.

We refer, of course, to the authoritative and unambiguous action finally taken by the New York State Legislature in 1945 and 1948 with respect to the controversy which has now occupied the attention of our courts for a quarter of a century.

If there were any doubt as to the proper determination of the case along common-law lines, it has been completely [fol. 515] eliminated by the Legislature. In April of 1945 (L. 1945, ch. 693), the Governor signed a bill adding a new article 5-C to the Religious Corporations Law consisting of four sections, two of which, sections 105 and 107, are presently material. In 1948 (L. 1948, ch. 711) important amendments were made to these sections which will be noted later. In the first section (§ 105), the Legislature defined the "Russian Church in America" (i.e., the North American church as we have referred to it above) and carefully traced its origin. The first paragraph of the section 105, as it reads today, is as follows: "The '*Russian Church in America*', as that term is used anywhere in this article, *refers to that group of churches, cathedrals,* chapels, congregations, societies, parishes, committees and other religious organizations of the Eastern Confession (Eastern Orthodox or Greek Catholic Church) *which were known as* (a) Russian American Mission of the Russian Orthodox Church from in or about 1793 to in or about 1870; (b) Diocese of Alaska and the Aleutian Islands of the Russian Orthodox Church from in or about 1870 to in or about 1904; (c) Diocese of North America and the Aleutian Islands (or Alaska) of the Russian Orthodox Church from in or about 1904 to in or about 1924; and (d) Russian Orthodox Greek Catholic Church of North America since in or about 1924; *and were subject* to the administrative jurisdiction of the Most Sacred Governing Synod *in Moscow* until in or about 1917, later the Patriarchate of Moscow, *but now constitute an administratively autonomous metropolitan district* created pursuant to resolutions adopted at a general convention (sobor) of said district held at Dertoit, Michigan, on or about or between April 2nd to 4th, 1924". (Emphasis supplied.)

The second paragraph of section 105, defines what is meant in the statute by the phrase "Russian Orthodox church." This is used as a word of art and is used generally to denote the particular local buildings or organizations of the Russian Orthodox faith as distinguished from the spiritual church. The statutory definition reads as follows: "A 'Russian Orthodox church', as that term is used anywhere in this article, is a church, cathedral, chapel, [fol. 516] congregation, society, parish, committee or other religious organization founded and established for the purpose and with the intent of adhering to, and being subject to the administrative jurisdiction of said mission [a above], diocese [b and c above], or autonomous metropolitan district [d above] hereinabove defined as the Russian Church in America." It is to be noted that the words "Russian Orthodox church" refer not only to those church buildings and religious organizations founded and established for the purpose and with the intent of adhering to, and being subject to the autonomous North American metropolitan district *since 1924*, but also to those properties and organizations adhering and subject in the past to the Russian Mission from 1793 to 1870, and the North American Dioceses from 1870 to 1904 and from 1904 to 1924.

These definitions, in turn, make the meaning and intent of section 107 clear. With them in mind, the following command of the Legislature in section 107 is abundantly plain:

"1. *Every Russian Orthodox church in this state, whether incorporated before or after the creation of said autonomous metropolitan district*, and whether incorporated or reincorporated pursuant to this article or *other article of the religious corporations law*, or any general or private law, *shall recognize and be and remain subject to the jurisdiction and authority* of the general convention (sobor), metropolitan archbishop or other primate or hierarch, the council of bishops, the metropolitan council and other governing bodies and authorities *of the Russian Church in America*, pursuant to the statutes for the government thereof adopted at a general convention (sobor) held in the city of New York on or about or between

October 5th and 8th, 1937, and any amendments thereto and any other statutes or rules, heretofore or hereafter adopted by a general convention (sobor) of the Russian Church in America *and shall in all other respects conform to, maintain and follow the faith,* doctrine, ritual, communion, discipline, canon law, traditions and *usages of the Eastern Confession* (Eastern Orthodox or Greek Catholic Church).

[fol. 517] "2. * * *

"3. *The trustees of every Russian Orthodox church shall have the custody and control of all temporalities and property,* real and personal, belonging to such church and of the revenues therefrom *and shall administer the same in accordance with the by-laws* of such church, the normal statutes for parishes of the *Russian Church in America* approved at a general convention (sobor) thereof held at Cleveland, Ohio, on or about or between November 20th, to 23d, 1934, and any amendments thereto and all other rules, statutes, regulations and usages of the Russian Church in America." (Emphasis supplied.) Little, if anything, is left for the courts to construe in the face of such a clear manifestation of intent. St. Nicholas Cathedral, the subject property herein, is indisputably a "Russian Orthodox church", as defined in the statute. It was built in 1903 and dedicated as a cathedral in 1905, in connection with the establishment of the Diocese of North America and the Aleutian Islands, which as we have seen, is listed in the first paragraph of section 105. It is a "cathedral * * * founded and established for the purpose and with the intent of adhering to and being subject to the administrative jurisdiction of said mission, *diocese,* or autonomous metropolitan district hereinabove defined as the Russian Church in America". (Emphasis supplied.) As such, it is within the purview of subdivision 1 of section 107 and must be subject to the jurisdiction and authority of the governing bodies of the North American church. Likewise, pursuant to subdivision 3 of section 107, the trustees of the St. Nicholas Cathedral corporation must administer the cathedral in accordance with the by-laws, the normal statutes for parishes of the Russian Church in America as therein defined.

Special Term attempted to construe the statute, as it

stood in 1945, in such a manner as to make it applicable *only* to those *new* parishes, founded and established *after 1924* for the express purpose of adhering to the Russian Church in America. Whether the court's construction was justified under the then wording of the statute is not before us, for after the decision at Special Term, and obviously [fol. 518] as a result of it, the Legislature amended the statute to read in its present form, above quoted. In order that there might not be any doubt that the 1945 legislation was intended to apply to a property, such as St. Nicholas Cathedral, the second paragraph of section 105, defining "Russian Orthodox Church", was amended so that there was included within its compass any cathedral "founded and established for the purpose and with the intent of adhering to, and being subject to the *administrative* jurisdiction of said *mission, diocese or autonomous metropolitan district hereinabove defined* as the Russian Church in America." (New matter italics.) Likewise, subdivision 1 of section 107, which provides that every such Russian Orthodox church in this State shall "recognize and be and remain subject to the jurisdiction and authority" of the Russian Church in America, was amended to provide that such Russian Orthodox churches were within its coverage "whether incorporated *before or after the creation* [1924] *of said autonomous metropolitan district.*" (New matter italics.) These significant amendments, enacted within a month after Special Term's decision, illustrate beyond cavil that the decision of that court did not correspond with the intent of the Legislature, which immediately interpreted and explained its prior enactment.

Nevertheless, the majority in the Appellate Division, while conceding that plaintiff was entitled to the benefit of the statute in its amended form, failed to properly appreciate and give meaning to what we consider to be the plain legislative intent. It said in part (p. 317): "In other words, it appears to us that it [§ 107] was intended to mean that any church *heretofore or hereafter* incorporated for the purpose of adhering to the American Church must be subordinate to the rules and the decisions of the authorities of the governing bodies of that church [the American church, the autonomous metropolitan district, created in 1924]." Such a view gives no meaning to the change

made by subdivision 1 of section 107, by the 1948 amendment. That amendment excised the three words "(heretofore or hereafter)" which we have italicized in the above quotation, and substituted the word: "before or after the [fol. 519] creation of said autonomous metropolitan district, [in 1924] * * *." The following quotation from subdivision 1 of section 107 shows in brackets the words eliminated by the 1948 amendment and indicates by italicizing the words substituted by that amendment: "Every Russian Orthodox Church in this State, whether [heretofore or hereafter] incorporated *before or after the creation of said autonomous metropolitan district,* * * * shall recognize and be and remain subject to the jurisdiction and authority of * * * the Russian Church in America, * * *." The Legislature quite clearly made the amendment after the decision at Special Term herein so as to remove the possibility of a construction such as that adopted by the Special Term and later the Appellate Division, that the statute was limited in its operation to churches incorporated after 1924. If, as the Appellate Division construed it, the statute were limited to churches "incorporated for the purpose of adhering to the American Church", that would mean that it could only apply to churches founded and established after 1924, since that was the year in which the autonomous metropolitan district, denominated by the Appellate Division, the American church, was created. Yet subdivision 1 of section 107 clearly states that it is to apply to Russian Orthodox churches "whether incorporated *before or after* the creation of said autonomous metropolitan district," i. e., before or after 1924. The only construction which gives meaning to all the language in sections 105 and 107 is that the statute was intended to apply to those Russian Orthodox churches founded and established before 1924 for the purpose of adhering and being subject to the North American Mission or North American Diocese, and to those Russian Orthodox churches founded and established after 1924 for the purpose of adhering and being subject to the autonomous metropolitan district. The majority in the Appellate Division further intimated that to read the statute literally would result in an interference in ecclesiastical concerns not within the competency of the Legislature. The latter suggestion is

the only one which requires discussion, for, as already indicated, the intent of the Legislature (as distinguished from its competency) is unmistakable.

[fol. 520] The primary purpose of the Religious Corporations Law is to provide for an orderly method for the administration of the property and temporalities dedicated to the use of religious groups and to preserve them from exploitation by those who might divert them from the true beneficiaries of the trust. Prior to 1875, when the Legislature provided for denominational control of the temporalities of religious corporations, the majority of the members of a religious corporation could change its denominational character and devote the church property to an entirely different religious faith than that for which it was originally dedicated. (*Robertson* v. *Bullions*, 11 N. Y. 243, 263-264; *Petty* v. *Tooker*, 21 N. Y. 267; *Gram* v. *Evangelical Lutheran Soc.*, 36 N. Y. 160). For the public good, the Legislature decreed that the trustees of religious corporations, irrespective of the wishes of the majority of the local congregation, must administer the temporalities in accordance with the discipline, rules and usages of the ecclesiastical body, if any, to which the corporation was subject. (Religious Corporations Law, § 5.) As a broad guide this rule undoubtedly has worked well, but it is by no means a constitutional doctrine not subject to change or modification by the same Legislature which announced it, in cases where literal enforcement would be unreasonable and opposed to the public interest. The Legislature, in the exercise of its extensive and acknowledged power to act for the common welfare, may find as a fact that a situation has arisen of such novelty and uniqueness that existing law is incapable of performing its avowed function—the preservation of religious temporalities for the use of their original and accustomed beneficiaries. If the Legislature find as a fact that, because of drastically changed circumstances, the accustomed beneficiaries of religious properties are thus threatened with their loss, and if there be a basis for such finding, we perceive no constitutional objection to a legislative attempt to trace and identify, as of today, the authentic group entitled to the administration of such properties.

That, as we see it, is all that the Legislature has done in the above-quoted provisions of article 5-C. The Legisla- [fol. 521] ture has made a determination that the "Russian Church in America" was the one which, to use our words in 249 New York at pages 77, 78, was the trustee which "may be relied upon to carry out more effectively and faithfully the purposes of this religious trust (*Carrier* v. *Carrier*, 226 N. Y. 114)" by reason of the changed situation of the patriarchate in Russia. No purpose would be served by repeating all the circumstances which forced the North American church to declare its temporary autonomy, and the process by which the Moscow Patriarchy has been subjugated by the Russian Government and used as its tool. All that has been detailed fully above. These facts must be deemed to have been found by and to have been within the actual knowledge of the Legislature when it decided to act in 1945 and 1948. Even assuming that we, as judges, are prevented from recognizing these facts, it cannot be successfully contended that the Legislature is required to labor under such unrealistic handicap.

The Legislature of the State of New York, like the Congress of the United States, in addition to the general knowledge of its members, has access to vast sources of information to assist in determining the need and scope of new statutory law. Every new piece of legislation is the result of certain factual premises, whether they be expressed or tacit. In gathering the material for these premises, and in evaluating conflicting data, the Legislature is not bound by any formal rules. It has the widest latitude of inquiry. It cannot, and does not, close its eyes to any legitimate avenue of knowledge.

The courts have always recognized that it is the province of the Legislature to make the underlying findings of fact which give meaning and substance to its ultimate directives. The courts have traditionally refused to consider the wisdom of technical validity of such findings of fact, if there be some reasonable basis upon which they may rest.

Thus, in passing upon matters of legislative intent and competence, the courts do not merely read the bare end product of the legislative labors. They read the statute in

the light of the state of facts which were found by the Legislature, and which prompted the enactment? Then, and [fol. 522] only then, can the courts intelligently approach their assigned tasks.

A recent pertinent example of such judicial recognition of the extent of the power of the legislative body to find the facts in a situation involving communist activity is found in *American Comunications Assn.* v. *Douds* (339 U. S. 382). There, the noncommunist oath provision in the National Labor Relations Act was upheld, not because any such oath requirement was generally within the power of Congress, but because the specific evil, *the existence of which Congress was assumed to have reasonably found as a fact,* was such that some infringement upon traditional liberties was justifiable. The case illustrates well that enactments which might seem unconstitutional on their face may yet be sustained if the factual background found by the legislative body warranted an extended exercise of its powers. The case is noteworthy, too, in that it rejects the fallacious contention that the legislative body cannot go behind a carefully constructed facade to ascertain the real motives, ends and techniques of communist activity. It recognizes, as we must recognize in the instant case, that problems created by the extension of Soviet communist activity in this country are *suigeneris,* and can only be dealt with intelligently on that basis.

As Justice JACKSON said in his opinion (p. 423, fn. 1): "Of course, it is not for any member of this Court to express or to act upon any opinion he may have as to the wisdom, effectiveness or need for this legislation. 'Our inquiries, where the legislative judgment is drawn in question, must be restricted to the issue *whether any state of facts either known or which could reasonably be assumed affords support for it.' United States* v. *Carolene Products Co.*, 304 U. S. 144, 154." (Emphasis supplied.) (See, also, *Powell* v. *Pennsylvania,* 127 U. S. 678, 685; *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 257-258; *Szold* v. *Outlet Embroidery Supply Co.*, 274 N. Y. 271, 278.)

The judicial technique of ascertaining the legislative finding of fact supporting a particular enactment is shown

in Justice JACKSON's opinion in the *Douds* case (*supra*, pp. 424-433). He wrote (p. 424):

[fol. 523] "From information before its several Committees and from facts of general knowledge, Congress could rationally conclude that, behind its political party facade, the Communist Party is a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system. A rough and compressed grouping of this data would permit Congress to draw these important conclusions as to its distinguishing characteristics." (Then follows a footnote containing a long list of books and articles.) * * *

"It rejects the entire religious and cultural heritage of Western civilization, as well as the American economic and political system. This Communist movement is a belated counter-revolution to the American Revolution, designed to undo the Declaration of Independence, the Constitution, and our Bill of Rights * * *" (p. 425).

The Legislature of the State of New York, like the Congress, must be deemed to have investigated the whole problem carefully before it acted. The Legislature knew that the central authorities of the Russian Orthodox Church in Russia had been suppressed after the 1917 revolution, and that the patriarchate was later resurrected by the Russian Government. The Legislature, like Congress, knew the character and method of operation of international communism and the Soviet attitude toward things religious. The Legislature was aware of the contemporary views of qualified observers who have visited Russia and who have had an opportunity to observe the present status of the patriarchate in the Soviet system.[17] The Legislature real-

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[17] Our former Ambassador to Russia wrote: "The new tolerance for the Orthodox Church can be seen, therefore, as severely limited and primarily designed to serve as an instrumentality of an expansive foreign policy." (Walter Bedell Smith, My Three Years in Moscow, p. 268.) See also, Anne O'Hare McCormick in the *New York Times*, April 8, 1950: "The church has again an official place in the Soviet Union, but as an agency of the state; on the

ized that the North American church, in order to be free of Soviet interference in its affairs, had declared its tem- [fol. 524] porary administrative autonomy in 1924, pursuant to the ukase of 1920, while retaining full *spiritual* communion with the patriarchate, and that there was a real danger that those properties and temporalities long enjoyed and used by the Russian Orthodox Church worshippers in this State would be taken from them by the representatives of the patriarchate. On the basis of these facts, and the facts stated (*supra*) and no doubt other facts we know not of, our Legislature concluded that the Moscow Patriarchate was no longer capable of functioning as a true religious body, but had become a tool of the Soviet Government primarily designed to implement its foreign policy. Whether we, as judges, would have reached the same conclusion is immaterial. It is sufficient that the Legislature reached it, after full consideration of all the facts.

It is clear, therefore, that the plaintiff corporation and the autonomous metropolitan district which it represents, must prevail in this action in accordance with the legislative finding and mandate and be reinvested with the possession and administration of the temporalities of St. Nicholas Cathedral.

The judgments below should be reversed, with costs in all courts, and judgment directed for the plaintiff.

Froessel, J. (concurring). As I view this controversy, we have the rather unusual situation of a foreign government, which all of us agree is grossly antireligious, assuming domination and control over the Russian Orthodox Church, leaving that church fettered, helpless and restrained of its freedom. Any other view, it seems to me, is to ignore stark reality. Under that domination, which is nothing less than plain duress, it seeks to reach out to the United States to assume control of church property within this State, title to which is held by plaintiff, a New York

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same terms the religious leaders being imprisoned and executed as 'traitors' in the countries under Soviet control would be tolerated. When Caesar is also God there can be no divided tribute."

State corporation, and which property has been dedicated to the use of members of a parish and of a diocese.

The evidence in the records before us, and as outlined in the prevailing opinion, buttressed by facts of historical knowledge of which we may take judicial notice (*Nankivel* v. *Omsk All Russian Government*, 237 N. Y. 150, 156), and [fol. 525] as found by the Legislature of this State (*East New York Sav. Bank* v. *Hahn*, 293 N. Y. 622), leads inescapably to the conclusion that plaintiff is entitled to judgment.

Judge Conway has sufficiently outlined in detail the history of the Russian Orthodox Church, so far as pertinent here. We are all in accord that the election of Patriarch Tikhon at the sobor of 1917-18, following the Kerensky revolution, had indisputable validity, and that Archbishop Evdokim was the duly appointed diocesan archbishop for North America in 1917, before he returned to Russia. It was he who held title to the property in suit for a short time (1916-17), and then voluntarily reconveyed it to plaintiff's corporate predecessor. After Kerensky was overthrown and the Bolsheviks came into power, the patriarchal chain of succession was broken. The prevailing opinion outlines briefly what happened to the Russian Orthodox Church in Russia. When Patriarch Tikhon, the last duly elected patriarch, was imprisoned, he issued his famous ukase to the Russian Orthodox Church abroad. In 1923, with the concurrence of the Sacred Synod, he designated Platon as ruling bishop of the North American church, who continued until his death in 1934, following his active participation in and approval of the American sobors, commencing in 1922, which invoked the ukase of 1920.

The first sobor of the Russian Orthodox Church held since Tikhon was elected Patriarch was the pseudo-sobor of 1923, at which no Patriarch was elected, and which is now conceded to have been uncanonical. The only other sobor held since was the one at Moscow in 1945, when the American delegates, two clergymen, were met by a Russian airplane, but deposited in Siberia instead of Moscow in the month of January, rendering it impossible for them to complete their journey by train until ten days after the sobor had adjourned, thus denying them representation though duly invited.

We do not have here any such situation as was presented in *Watson* v. *Jones* (13 Wall. [U. S.] 679) where the highest church body was concededly free. Here, the Russian Orthodox Church, as presently constituted and dominated, is [fol. 526] not free, its administrative agency is not the true body of the church, and is compelled to demand loyalty to the Soviet Government from all the priests of the Russian Church abroad.

By our decision, we are not intruding unlawfully into the internal affairs of a religious body, but rather refusing to sanction such intrusion by an atheistic foreign government, so far as it affects property within our jurisdiction. Plaintiff-appellant holds title to the property in suit, in trust, not for the Russian Orthodox Church, but rather for the use of the membership for whom it was dedicated, and, so long as it administers the property for the faithful of the church within the diocese, it is entitled to possession and control. (*Westminster Presbyt. Church* v. *Trustees of Presbytery of N. Y.*, 214 N. Y. 213.) As we there said (pp. 225, 226), where the ecclesiastical governing body's freedom of action was unquestioned, "* * * The error which, as it seems to me, pervades the disposition made of this case in the courts below, is the idea that the Presbytery could take away from the Westminster Presbyterian Church of West Twenty-third Street all authority and control of its trustees over its real property, and by hostile action appropriate that property to such uses as it saw fit without any legal proceeding to that end, and wholly by the exercise of the ecclesiastical jurisdiction of the Presbytery." How much more so does this reasoning apply to the instant situation.

I concur in Judge Conway's opinion.

Desmond, J. (dissenting). None of us, of course, deny that the present Russian Government is frankly and grossly antireligious and irreligious. But judicial recognition of that well-known fact is of no help in deciding this lawsuit. We are dissenting here because we strongly feel that this decision is an unlawful intrusion into the internal affairs of a religious body, contrary to first principles of American Government, violative of the First Amendment's guaranty of freedom of religions from such gov-

ernmental interference, and in conflict with the controlling decisional law as set forth in *Watson* v. *Jones* (13 Wall. [U. S.] 679) and *Westminster Presbyt. Church* v. *Trustees of Presbytery of N. Y.* (211 N. Y. 214). For the decision about to be made is just this: that the judical and legis- [fol. 527] lative branches of the Government of this State have the power (and that the New York State Legislature has exercised the power) to oust from the archdiocesan cathedral of the Russian Orthodox Church in New York City, a prelate (defendant Benjamin) who has been appointed archbishop of that archdiocese by the Patriarch of Moscow, supreme head of that church. No other decision reaching such a result can be found in the books.

In aid of clarity we set down these indisputable and uncontested propositions:

1. The Russian Orthodox Church is a "general" or centrally-organized church (see *Watson* v. *Jones, supra,* p. 722), under whose law and discipline the Patriarch of Moscow, as its supreme head, has the power of appointing archbishops.

2. Defendant Benjamin was appointed by the Patriarch as archbishop of the diocese of North America and the Aleutian Islands, and that appointment is now in effect.

3. The Russian Orthodox Cathedral in New York City, is the See church of the archdiocese, and, accordingly, defendant Benjamin, as the duly appointed archbishop is entitled to possess and occupy that cathedral as his See church.

4. Plaintiff-appellant, a New York corporation, holds title to the cathedral property but, under New York law, that title is in trust for the religious purposes of the Russian Orthodox Church, and for no other purpose (*Westminster Presbyt. Church* v. *Trustees of Presbytery of N. Y.*, 211 N. Y. 214, 223, *supra*).

5. Plaintiff, in seeking to exclude defendant Archbishop Benjamin from possession of the cathedral, is acting under the control of, and in the interest of, a dissident or schismatic group of Russian Orthodox Catholic individuals and parishes, which group, formed at Detroit in 1924, refuses to recognize the authority and primacy of the Patriarch of Moscow.

6. Under the law of New York (see Religious Corporations Law, § 5), religious denominations, such as the world-[fol. 528] wide Russian Orthodox Church, have denominational control over their constituent churches, parishes or branches, and the constituents cannot escape such control by secession (*Trustees of Presbytery of N. Y.* v. *Westminster Presbyt. Church*, 222 N. Y. 305, 315).

7. The appointment of Archbishop Benjamin, as an official act of the highest Russian Orthodox Church authority, was a decision on a denominational matter of internal church government, and as such is final and absolutely binding on the civil courts of this State (*Watson* v. *Jones*, 13 Wall. [U. S.] 679, 727, 729, *supra*).

The sum of those plain propositions is this: that Archbishop Benjamin's possession of the cathedral is not subject to control by any civil authority or by any judgment of a civil court, and that no civil court may decree to the independent or nonconformist group (which controls plaintiff corporation), possession of that cathedral, hostile to the authority and action of the mother church (*Watson* v. *Jones, supra*, at p. 734).

What bases, then, are announced for the direction by this court that a judgment issue which will remove defendant Benjamin from his cathedral? As we understand it, those asserted grounds are two: first, that the Moscow Patriarchate is not in fact functioning as the true central organization of the Russian church but is a mere agency or instrumentality of the Soviet regime; and, second, that article 5-C of the New York Religious Corporations Law has, by legislative fiat, ousted the patriarchal appointee, and turned the cathedral over to the schismatics. The first of those bases amounts to a new finding by this court, without evidentiary support in this record, and in the face of contrary testimony, and express contrary findings by both courts below. The second basis gives to article 5-C a construction not reasonably supported by its language, or by its history, or by any reasonable or discoverable legislative intent—a construction which, furthermore, makes the statute unconstitutional. We now take up these matters in turn.

The finding, or determination, now being made by the majority of this court as a basis for reversal is that

the presently ruling Patriarch of Moscow is not, and should [fol. 529] not, be treated as, the true central head of the church, but that he is a mere fellow traveler on the communist road, serving not God but the Soviet Caesar. Interestingly enough, plaintiff itself seems not to cast so cold an eye on the Patriarch, since the record abounds with protestations by the "American", or schismatic Orthodox Russians, of their filial loyalty and devotion to the Patriarch, whom they regard as a virtuous and venerable spiritual leader. Aside from that, and confining ourselves within the strict bounds of our own jurisdiction we, the Court of Appeals, have, of course, no power or right to adjudicate that the incumbent is no true Patriarch but a mere usurper or pretender. We dissenters refuse so to do, not from any mere naiveté as to Russia and communism, but as a necessary conclusion from the record in this lawsuit. At the very most, we have here the attempted determination of a fact, vigorously denied by witnesses, and found to the contrary by the courts which have jurisdiction to pass on facts.

It is suggested that common sense, or general knowledge, makes it appropriate for us to take judicial notice that Patriarch Alexy is not acting independently but is obeying commands of his communist masters. Perhaps he is, for all we know, but his motivation is no proper subject of judicial notice. Many years ago our predecessors warned us against taking judicial notice in such uncertain fields (see *Baxter* v. *McDonnell*, 155 N. Y. 83, 93). And, even if we could, somehow or other, get sure knowledge that the Patriarch's appointment of this archbishop was made for the most unholy reasons, or because of the meanest accommodation to brute power, we still could not, as a court, strike down the appointment or refuse to give it credit. The Patriarch, like all men, must account for his stewardship, but not to the New York courts.

The long and the short of it is that this is an ecclesiastical matter, to which, be their answer right or wrong, the ecclesiastic superiors have the final answer. "* * * and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of

uncertainty and doubt, which would do anything but improve either religion or good morals" (*Connitt* v. *Reformed* [fol. 530] *Protestant Dutch Church of New Prospect*, 54 N. Y. 551, 562). We are not talking about the powers of courts or of government to keep from our shores persons dangerous to our institutions, be they churchmen or laymen, or to deal with such persons when and if they violate our laws. No one has testified that Archbishop Benjamin is such a subversive, and, if he were, the New York courts would hardly be the place, or an action of ejectment the method, to arrange for his deportation from our shores. The United States Government has never withdrawn recognition of the Russian Orthodox Church and its Patriarch (see *Ponce* v. *Roman Catholic Church*, 210 U. S. 296, 318).

We turn now to the statute which seems to be appellant's chief reliance. Article 5-C of the Religious Corporations Law, consisting of four sections (§§ 105-108), was enacted in 1945 (L. 1945, ch. 693) and amended in 1948 (L. 1948, ch. 711). Its language follows the general pattern of several other articles in the same law. On its face there is no indication that it had any purpose other than that of any other special or general law incorporating a religious society or sect or church, that is, "to give an organization for public worship legal rights, and to impose on its legal obligations as a corporate body * * *" (*Van Buren* v. *Reformed Church of Ganzevoort*, 62 Barb. 495, 497; *Petty* v. *Tooker*, 21 N. Y. 267, 271). Incorporation of a church is the method by which the municipal law recognizes a church's present existence. Obviously, such a statute cannot be a device for transferring property from one faction to another, or for subjecting centrally organized churches to the control of seceding groups. Neither of those two general statements will be contradicted, and yet we are told that the passage by the New York Legislature, in 1945, of article 5-C and its amendment in 1948, had the precise and intended effect of freeing the whole Russian Orthodox religious community in America from its traditional submission to its supreme hierarchial head, of outlawing in New York so much of that community as remained submissive to the Patriarch, of putting the whose group and all its properties under the control of the new schismatic "Russian Church of America", and, specifically, of man-

dating the ouster of the patriarchically appointed arch-[fol. 531]bishop and the substitution of a rival claimant, not so appointed. We confidently assert that there is nothing in the statute itself to suggest such a legislative coup, that there is much to show that such was not the legislative purpose, and that the statute, if so intended and so construed, is plainly unconstitutional.

The first section (105) in article 5-C is headed "Definitions". It is not in form or meaning a preamble or legislative finding of fact. It defines two terms used elsewhere in the article: "Russian Church in America" and "Russian Orthodox Church". The long, one-sentence definition of the first of those terms says that, as used in the article, it means those churches, cathedrals, parishes, etc., which were known as the Russian American Mission of the Russian Orthodox Church from 1793 to 1870, then known as the Diocese of Alaska, etc., from 1870 to 1904, then as the Diocese of North America and the Aleutian Islands from 1904 to 1924, and which have been known as the Russian Orthodox Greek Church of North America since 1924, and which were subject to the administrative jurisdiction of the Most Sacred Governing Synod in Moscow until 1917, later the "Patriarchate of Moscow", but which, now constitute an administratively autonomous metropolitan district created pursuant to resolutions adopted at a general convention (sobor) of said district held at Detroit, Michigan, on or about or between April second to fourth, nineteen hundred twenty-four". A "Definition" of a term is a precise statement of its meaning. Nothing could be more precise than the statement (above summarized) which the Legislature thus gave us of what the Legislature meant by the use in article 5-C of the term "Russian Church in America". The definition describes, by reciting its history, the particular "group" of churches intended to be affected by the article. So read, the definition cannot possibly mean anything but this: that the "group" of churches or parishes thus recognized by the Legislature under the name "Russian Church in America", were those particular churches and parishes which were formerly part of the unified body called at successive times first the "Russian American Mission", then called the "Diocese of Alaska and the Aleutian Islands", then styled the "Diocese of

North America and the Aleutian Islands", and which have [fol. 532] been called the "Russian Orthodox Greek Catholic Church of North America" since 1924—in other words, the secessionists. To make that totally clear, the Legislature added to its "definition" a statement that it meant those churches, cathedrals or parishes which, though formerly subject to the Moscow Patriarch, had created themselves into an autonomous metropolitan district (or diocese) in April, 1924. On the trial, the witnesses agreed that not all the American parishes of the Russian Orthodox Church have gone over to the new "American" church. The definition described those who did so cross over. The second "definition" in section 105 (of "Russian Orthodox Church") says that term means a church, cathedral, etc., founded and established with the purpose and intent of adhering to the new metropolitan district.

The next section (106) or article 5-C sets forth the formalities for incorporation of a "Russian Orthodox Church", as defined in section 105. Section 107, as amended in 1948, prescribes the method of government, by the new "Russian Church in America" of "every Russian Orthodox Church in this state", whether incorporated before or after the creation of the new "autonomous metropolitan district". Appellate seizes upon the words "every Russian Orthodox Church in this state" as meaning, literally, every Russian Orthodox parish, church or cathedral, whether or not it has seceded, and whether or not it desires to retain its traditional ties with the Patriarch. Of course, the words must be limited as defined in section 105, which says precisely what they are to mean, when "used anywhere in this article".

Section 108, headed "reincorporation of existing corporations" authorizes the reincorporation "under the provisions of this article", of any "heretofore incorporated Russian Orthodox Church". Such a provision would be useless and meaningless if the Legislature had, by the previous sections of the article, put every Russian Orthodox church and parish, automatically, into the new, dissident, "Russian Church in America". Indeed, if so strange and ruthless a plan had been intended by the Legislature, section 105 itself ("Definitions") would have been mean-

[fol. 533] ingless and unnecessary since, with all included, there would be no need for any definition or limitation.

Article 5-C, we think, is so plain and clear as not to need or permit any construction beyond the patent meaning of its simple words (*Matter of Rathscheck*, 300 N. Y. 346, 350). But if construction were permissible, every known canon of construction would lead to the same result: that the Legislature could not have intended this as a statute of outlawry, ouster, or disestablishment. Words in a statute are to receive their natural and obvious meaning; the general purpose and spirit of the law is to be kept in mind; objectionable consequences, in justice and unreasonableness are to be avoided; acts will not be so construed as to accuse the Legislature of a purpose to do harm (see McKinney's Cons. Laws of N. Y. Book 1, Statutes [1942 ed.], §§ 94, 96, 141, 143, 146, 148, 151, and cases cited for these propositions). A bad result suggests a wrong construction (*People ex rel. Beaman* v. *Feitner*, 168 N. Y. 360, 366). We find another aid to construction in the very practical idea that the busy New York Legislature which enacted over 1,200 laws in 1945, and which had no committee reports or debates as to article 5-C, was entitled to believe that this law meant what it said, without hidden purposes.

And one of the most urgent of all the canons of construction is this one: that a statute must be construed, when possible, "in manner which would remove doubt of its constitutionality, and possible danger that it might be used to restrain or burden freedom of worship or freedom of speech and press" (*People* v. *Barber*, 289 N. Y. 378, 385). Put another way, the rule is that the construction, if at all possible, must be such as not only to avoid unconstitutionality but to avoid grave doubts thereof (*Matter of Cooper*, 22 N. Y. 67, 87, 88; *Kovacs* v. *Cooper*, 336 U. S. 77, 85; *Tauza* v. *Susquehanna Coal Co.*, 220 N. Y. 259, 267; *People* v. *Realmato*, 294 N. Y. 45, 50; *United States* v. *Jim Fuey Moy*, 241 U. S. 394, 401). How can there be any dispute but that this article 5-C, if read so as to take this archbishopric from the control of the central church and give it to appellant's group, is unconstitutional? *Watson* v. *Jones* (*supra*), does not use the precise word "unconstitu-
[fol. 534] tional" but the opinion, contrasting American with old world systems (see p. 728 *et seq.* of 13 Wall [U. S.]),

says that "in this country the full and free right to entertain any religious belief, to practice any religious principle" finds expression in the American rule of law that the determinations of the tribunals and judicatories of a centrally-organized church are absolutely binding on the civil power. The modern Supreme Court in *Everson* v. *Board of Educa.* (330 U. S. 1, 13), has cited *Watson* v. *Jones* (*supra*), as authority for the proposition that the First Amendment provides "protection against governmental intrusion on religious liberty" through statutes. It is no answer to this charge of unconstitutionality that there is here in dispute a "property right" only as to the use of a building. "* * * when rights of property are dependent upon the questions of doctrine, discipline or church government, the civil court will treat the determination made by the highest tribunal within the church as controlling" (*Baxter* v. *McDonnell*, supra, 155 N. Y., 83, 101, citing *Watson* v. *Jones, supra;* and *Connitt* v. *Reformed Protestant Dutch Church of New Prospect, supra;* see *Gonzales* v. *Archbishop of Manila*, 280 U. S. 1, 16).

We pause to remark on the notable similarity between the present case and *Watson* v. *Jones* (*supra*). A controversy over slavery split the Presbyterian Church in Kentucky in the 1860s; dissension over communistic ideologies and Soviet controls played their part in the internecine warfare which broke out among the American members of the Russian Orthodox Church. A faction withdrew from the central control in the Presbyterian Church; plaintiff's faction here divorced themselves from their supreme hierarch. In *Watson* v. *Jones*, the Supreme Court, holding the Presbyterian controversy to be "a case of division or schism" (p. 717), as is surely true of our case, made the classic statement of law which runs from page 722 to the end of the long opinion. The holding as between the dissenters and the central organization was summarized thus: "They [the schismatics] now deny its authority, denounce its action, and refuse to abide by its judgments. They have first erected themselves into a new organization, and have since joined themselves to another totally [fol. 535] different, if not hostile, to the one to which they belonged when the difficulty first began. Under any of the decisions which we have examined, the appellants, in their

present position, have no right to the property, or the use of it, which is the subject of this suit" (p. 734).

Going back to the statute (art. 5-C) and its supposed effect here, we have, fortunately the strongest kind of proof from the Religious Corporations Law itself that the Legislature never intended for article 5-C the meaning and result now ascribed to it. In 1943 (ch. 145 of that year) the Legislature, two years before it set up article 5-C, had enacted a new article XV of the Religious Corporations Law and had, concurrently, amended subdivision 3 of section 15 of the Religious Corporations Law. That 1943 legislation described and recognized a "Federation" of the "Four Primary Orthodox Greek Catholic Jurisdictions in America", being the churches, congregations, etc., recognized by the "apostolic historic Orthodox Patriarchates of Constantinople, Antioch, Moscow and Serbia (Jugoslavia)". Among other things, that 1943 law described the processes whereby new congregations adhering to the four historic patriarchates could be newly incorporated or reincorporated as member churches of the federation. The significance for us is this: as late as 1943, the Legislature was thus legislating as to those churches which were under the government of the Moscow Patriarch. The Governor of New York, after signing the bill, made it clear that he so understood its import. In a speech at Buffalo (see Public Papers of the Governor, 1943, p. 550) Governor Dewey said: "For more than one hundred and eighty years members of the Greek Church have been on what is now American soil. We find in the records that as long ago as 1763 a native of the Aleutian Islands was converted by a devout and hardy missionary from Russia. Nineteen years later the Holy Synod sent a mission of eight monks to Alaska and in 1794 they established missionary headquarters on the Kodiak Island. Three years later the hierarchy of the Greek Church consecrated a Bishop of Alaska, but he perished at sea before he could ever reach his diocese. The living successor of the reverend prelates who succeeded [fol. 536] him is The Most Reverend Metropolitan Benjamin of New York. It is an interesting historic fact, particularly in these days, that his full title is Metropolitan of the Archdiocese of the Aleutian Islands and North America."

The Most Reverend Metropolitan Benjamin whom the Governor thus saluted as the successor to the historic line of Orthodox prelates in America was our defendant Benjamin.

Thus we see that in 1943, by article XV and the amendment to section 15, the Legislature dealt with those Orthodox churches which remained loyal to the Patriarch and in 1945 and 1948, through article 5-C, gave its attention and recognition to the new, nonconformist "American Church". There is no slightest sign that the Legislature intended the later statutes to repeal the earlier. We should not strain to discover a repeal by implication but must read these statutes as harmonious parts of a whole and assume that the Legislature in 1945 knew what it had done in 1943 (*Matter of Cooper, supra*, 22 N. Y. 67, 88; *Chase* v. *Lord*, 77 N. Y. 1, 18; *Matter of Tiffany*, 179 N. Y. 455, 457; *Matter of Timmis*, 200 N. Y. 177, 181; *Betz* v. *Horr*, 276 N. Y. 83, 88; *Morris Plan Ind. Bank of N. Y.* v. *Gunning*, 295 N. Y. 324, 331). "The intent and purpose of the legislative commands must be found from the statutes relating to the same general subject-matter taken as a whole" (*Betz* v. *Horr, supra*, p. 88). "If by any fair construction, whether strict or liberal, a reasonable field of operation can be found for both acts, that construction should be adopted. In other words, if the old and the new law, by any reasonable interpretation, can stand together, there is no repeal by implication" (*Matter of Tiffany, supra*, p. 457). The Legislature in 1943 dealt with the patriarchal church, in 1945 with the American church, and there is no repugnance, inconsistency or over-lapping of the two sets of statutes.

A final comment:

In the long run, communist repression and abuse of religion will make religion stronger, for "the blood of the martyrs is the seed of the Church". And so with government interferences with churches in our country. But with us the loser will be a traditional principle of American [fols. 537-538] Government: that the inner affairs of religious bodies are no concern of the state.

The judgments should be affirmed, with costs.

LEWIS, DYE and FROESSEL, JJ., concur in opinion by CONWAY, J.; LEWIS, CONWAY and DYE, JJ., concur in separate

opinion by FROESSEL, J.; DESMOND, J., dissents in opinion in which LOUGHRAN, Ch. J., and FULD, J., concur.

Judgment reversed, etc.

[fol. 539] IN COURT OF APPEALS OF NEW YORK

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH OF NORTH AMERICA, *Appellant*,

vs.

JOHN KEDROFF & ANO., & C., *Respondents*

REMITTITUR—December 1, 1950

Be it remembered, That on the 25th day of April in the year of our Lord one thousand nine hundred and fifty Saint Nicholas Cathedral of the Russian Orthodox Church of North America the appellant in this cause, came here unto the Court of Appeals, by Ralph Montgomery Arkush, its attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And John Kedroff & ano., & c., the respondents in said cause, afterwards appeared in said Court of Appeals by Philip Adler, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 540] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Ralph Montgomery Arkush, of counsel for the appellant, and by Mr. Philip Adler, of counsel for the respondents, and after due deliberation thereon did order and adjudge that the Judgments herein be and the same hereby are reversed, with costs in all courts, and judgment directed for the plaintiff.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

[fol. 541] Wherefore, it is considered that the said judgments be reversed, with costs & c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals

aforesaid, by it given in the premises, are by said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in said Supreme Court, before the Justices thereof, & c.

Raymon J. Cannon, Clerk of the Court of Appeals of the State of New York.

Clerk's Certificate to foregoing papers omitted in printing.

[fols. 542-548] In Court of Appeals of New York

[Title Omitted].

Order Denying Motion for Reargument and Amending Remittitur—March 9, 1951

A motion for a reargument of the above cause, or, in the alternative, to amend the remittitur, having heretofore been made upon the part of the respondents, papers having been submitted thereon and due deliberation thereupon had, it is

Ordered that the motion for reargument be and the same hereby is denied. The remittitur is amended by adding thereto the following:

Upon this appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz: whether Article 5-C of the Religious Corporations Law, as construed by this Court, violated any rights of the defendants guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. This Court held that the aforesaid statute did not violate any of the rights of the defendants guaranteed by those Amendments to the Constitution of the United States.

And, the Supreme Court, New York County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy.

Gearon Kimball, Deputy Clerk.

[fol. 549] In Court of Appeals of New York

[Title Omitted]

Order Allowing Appeal—April 11, 1951

It appearing to this Court that John Kedroff and Benjamin Fedchenkoff, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church, have filed their petition for appeal to the United States Supreme Court and have filed herewith their assignment of errors as well as their statement as to the jurisdiction of said Court as required by rule 12 thereof, disclosing that said Court has jurisdiction upon appeal to review the judgment of the Court of Appeals of the State of New York rendered on November 30th, 1950, in favor of appellee and against appellants, and the judgment of the Supreme Court of the State of New York, entered on April 4, 1951, pursuant to the remittitur of the Court of Appeals, it is

Ordered that the appeal as prayed for be and the same hereby is allowed to the Supreme Court of the United States from said judgment of the Court of Appeals of the State of New York rendered on November 30th, 1950, in favor of appellee and against appellants and from the judgment of the Supreme Court of the State of New York, entered on April 4th, 1951, pursuant to the remittitur of the Court of Appeals, and that said appellants give a bond with good and sufficient surety in the sum of Five Hundred ($500.00) Dollars that they, as appellants, shall prosecute [fol. 550] their appeal to effect and also pay damages and costs if they fail to make their appeal good.

It is further ordered that citation shall be issued in accordance with law.

Dated: April 11th, 1951.

John T. Loughran, Chief Judge of the Court of Appeals.

[fol. 551] IN COURT OF APPEALS OF NEW YORK

[TITLE OMITTED]

PETITION FOR ALLOWANCE OF APPEAL BY COURT OF APPEALS, STATE OF NEW YORK

To the Honorable John T. Loughran, Chief Judge of the Court of Appeals:

Appellants, John Kedroff and Benjamin Fedchenkoff, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church, feeling aggrieved by the judgment of the Court of Appeals of the State of New York rendered on November 30th, 1950, directing judgment in favor of appellee, and reversing the judgment of the Appellate Division of the Supreme Court of the State of New York, First Department, in favor of appellants and the judgment of the Supreme Court of the State of New York entered on April 4th, 1951, pursuant to the remittitur of said Court of Appeals, for the reasons set forth in their assignments of errors included herein, pursuant to Rule 36, Paragraph 1 of the Rules of the Supreme Court of the United States, respectfully pray that an appeal be allowed to the Supreme Court of the United States from the said judgment of the Court of Appeals, and said judgment of the Supreme Court of the State of New York, pursuant to the provisions of Section 1257 of Title 28 of the United States Code.

Pursuant to Rule 12 of the United States Supreme Court, appellants present with this petition a separate [fol. 552] typewritten statement particularly discussing the bases on which they claim the Supreme Court of the United States has jurisdiction to review the judgments in question.

Statement

This case is one in which is drawn into question the validity of Article 5-C of the Religious Corporations Law of the State of New York, L. 1945, c. 693; amended L. 1948, c. 711, on the ground that, as construed and applied by the Court of Appeals of New York, said statute is repugnant to the First and Fourteenth Amendments to the Constitution

of the United States, the decision of said Court of Appeals being in favor of the validity of such statute as so construed.

Therefore, in accordance with Rule 36, Paragraph 1 of the Rules of the Supreme Court of the United States and Section 1257, Title 28 of the United States Code, appellants respectfully show that the case is one in which a review may be had in the Supreme Court of the United States on appeal as a matter of right, and accordingly pray that such appeal be allowed and that a transcript of the record on appeal be certified and sent to the Supreme Court of the United States.

Assignment of Errors

Appellants in the above case, together with the foregoing petition for allowance of the appeal to the Supreme Court of the United States, file herewith the following assignments of errors which they alleged were committed by the Court of Appeals of New York in its judgment of November 30th, 1950 reversing the judgment in favor of appellants aforementioned:

1. The Court of Appeals erred in holding that Article 5-C of the Religious Corporations Law of the State of New York (Laws of 1945, c. 693; amended L. 1948, c. 711), as construed and applied by said Court to the appellants, is [fol. 553] constitutional, and in refusing to hold that said statute, so construed and applied, is unconstitutional because:

(a) it abridges the freedom of religion and the liberty guaranteed to them by the First and Fourteenth Amendments to the Constitution of the United States; and

(b) it takes their property rights without due process of law, in violation of said Fourteenth Amendment.

2. The Court of Appeals erred in reversing the judgment rendered in favor of the appellants by the Supreme Court of the State of New York and the judgment of the affirmance rendered by the Appellate Division of said Supreme Court for the First Department, and in directing a judgment against them and in favor of the appellee, because such judgment of reversal

(a) abridges the freedom of religion and the liberty guaranteed to them by the First and Fourteenth Amendments to the Constitution of the United States; and

(b) takes their property right without due process of law, in violation of said Fourteenth Amendment.

3. The Court of Appeals erred in holding that the Supreme Court of the State of New York has any discretion to award possession of Saint Nicholas Cathedral, the canonical seat of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church, to somebody other than the duly appointed and accredited Archbishop of said Archdiocese who is entitled to such possession under the canon law of said Church, [fol. 554] to wit, appellant Benjamin. Such holding necessarily involves interference in the internal affairs of said Church, and abridges the freedom of religion and the liberty guaranteed to the appellants by said First and Fourteenth Amendments.

4. The Court of Appeals erred in holding that the defense of the appellant Benjamin Fedchenkoff, that this action was barred by the statute of limitations of the State of New York, had been abandoned, waived, or otherwise effectively eliminated, and in failing and refusing to consider and rule on said defense on its merits. Such holdings were without any foundation in fact, were arbitrary and capricious, and denied said appellant the due process of law and the equal protection of the laws guaranteed to him by said Fourteenth Amendment.

5. The Court of Appeals erred and deprived appellants of due process of law guaranteed by said Fourteenth Amendment:

(a) In finding as matters of fact by judicial notice that "the Moscow Patriarchy has been subjugated by the Russian Government and used as its Tool" and "is not the true body of the church", and that "the Russian Orthodox Church, as presently constituted and dominated, is not free", and making said findings the "determinative" ground of its decision. Such findings were arbitrarily made, were contrary to the evidence, contrary to the findings of fact made by the Appellate Division, and were beyond the jurisdictional competence of the Court of Appeals.

(b) In finding that Saint Nicholas Cathedral is held in trust "for the benefit of the faithful for whose use it [fol. 555] was originally dedicated" i.e., "all the members of the diocese", and "not for the Russian Orthodox Church", and in making said finding a ground of its decision. Such finding was arbitrarily made and was contrary to the undisputed evidence that said Cathedral was consecrated to, and under the canon law of the Russian Orthodox Church, is held in trust for, possession and use of the duly appointed and accredited Archbishop of said Archdiocese as a residence, place of worship and administrative headquarters, was contrary to the findings of fact made by said Appellate Division, and was beyond the jurisdictional competence of the Court of Appeals.

(c) In making findings of fact based on evidence introduced in a different case between different parties (*Kedrovsky* v. *Rojdesvensky*, 214 App. Div. 483, affirmed 242 N. Y. 547), and in making said findings, a ground of its decision. Such findindgs were contrary to the findings of fact made in that case by said Appellate Division and were beyond the jurisdictional competence of the Court of Appeals.

(d) In applying said article 5-C of the Religious Corporations Law of the State of New York retroactively to the present action which was already pending when said statute became law.

Wherefore, appellants pray that an appeal be allowed to the Supreme Court of the United States from said judgment of the Court of Appeals of November 30th, 1950, and [fol. 556] the judgment of the Supreme Court of the State of New York, entered on April 4th, 1951, pursuant to the remittitur of said Court of Appeals and that said judgments be reversed.

Dated: April 10th, 1951.

Respectfully submitted, Philip Adler, Attorney for Defendants-Appellants.

Read April 11, 1951, John T. Loughran, Chief Judge, New York Court of Appeals.

[fols. 557-571] Citation in usual form omitted in printing.

[fols. 572-579] SUPREME COURT OF THE UNITED STATES

ST. NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA, *Appellee,*

against

JOHN KEDROFF and BENJAMIN FEDCHENKOFF, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church, *Appellants.*

STATEMENT OF POINTS TO BE RELIED UPON—Filed May 18, 1951

A. Appellants adopt, for their statement of points upon which they intend to rely on their appeal to this Court, the points contained in their assignment of errors heretofore filed herein.

B. Appellants designate the entire record, including the case on appeal heretofore printed, as filed in the above entitled case, for printing by the Clerk of this Court, except that the following may be omitted:

[fol. 580] SUPREME COURT OF THE UNITED STATES

No. 717, October Term, 1950

[TITLE OMITTED]

ORDER NOTING PROBABLE JURISDICTION—June 4, 1951

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 717

JOHN KEDROFF AND BENJAMIN FEDCHENKOFF, ETC.,

Appellants,

vs.

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH OF NORTH AMERICA

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

PHILIP ADLER,
Counsel for Appellants.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
The Statutory Provisions Which Sustain the Jurisdiction	1
Additional Grounds of Jurisdiction	2
The Date of the Judgments Sought to be Reviewed and the Date on Which This Application for Appeal is Presented	3
How Constitutional Questions Were Raised	3
The Statute Involved	4
Statement Respecting Opinions	5
Statement Showing that the Nature of the Case and the Rulings of the Court Are Such as to Bring the Case Within the Jurisdiction Relied On	6
The Russian Orthodox Church	8
The American Archdiocese	9
The Government of the Archdiocese	9
Relation Between the American Archdiocese and the Church at Large	10
Saint Nicholas Cathedral	10
The Metropolitan District	12
The Constitutional Issues Presented	15

Argument

The Statute, as Construed and Applied by the Court of Appeals, Constitutes an Abridgment of Freedom of Religion Guaranteed by the First and Fourteenth Amendments to the United States Constitution	16
The Constitutional Questions Presented by this Appeal are Substantial	23
The Clear and present Danger Rule	30
The Statute, as Construed and Applied by the Court of Appeals is a Taking of Property Without Due Process of Law in Violation of the Fourteenth Amendment to the United States Constitution	31

Page

The Retroactive Application of the Statute to this Action, Which was Already Pending When the Statute was Passed, Violates the Due Process Clause of the Fourteenth Amendment 32

The Direction by the Court of Appeals that the Trial Court Exercise its "Discretion" to Determine Whether Appellant Benjamin is the "Proper" Person or "Trustee" to Occupy St. Nicholas Cathedral, Violates His Religious Freedom Guaranteed by the First and Fourteenth Amendments 32

The Failure and Refusal of the Court of Appeals to Rule on the Merits of the Defense of Limitations of Appellant Benjamin While Directing Final Judgment Against Him is a Denial of Due Process of Law and Equal Protection of the Laws in Violation of the Fourteenth Amendment to the United States Constitution 34

Exhibit A: Article 5-C—Russian Orthodox Churches 38

Exhibit B: Opinions of Court of Appeals 41

Exhibit C: Opinions of Appellate Division 86

Exhibit D: Opinion of the Trial Court 126

Table of Cases

American Communications Assn. v. *Douds*, 339 U. S. 382 28

Backus v. *Fort Street Union Depot*, 169 U. S. 557 34

Brinkerhoff v. *Hill*, 281 U. S. 673 34

Campbell v. *Holt*, 115 U. S. 620 37

Cantwell v. *Connecticut*, 310 U. S. 296 ..... 17-18, 18, 20, 30

Chase Securities Corp. v. *Donaldson*, 325 U. S. 304 ..... 36, 37

Chicago, B. & O. R. R. Co. v. *Chicago*, 166 U. S. 226 34

Cooke v. *U. S.*, 267 U. S. 517 36

Drozda v. *Bossos*, 260 App. Div. 408 22

Ettor v. *Tacoma*, 228 U. S. 148 ..... 31, 32

Everson v. *Board of Education*, 330 U. S. 1 ..... 16, 83

Page

Federal Communications Commission v. *WJR*, 337 U. S. 265 36
Flournoy v. *Wiener*, 321 U. S. 253 2
Follett v. *McCormick*, 321 U. S. 573 16
Forbes Pioneer Boat Line v. *Everglades Drainage District*, 258 U. S. 338 ..... 31, 32
Kedrovsky v. *Rojdestvensky*, 214 App. Div. 483; af. 242 N. Y. 547 ..... 7, 11, 42, 51, 63, 88, 107
Kunz v. *New York*, 340 U. S. 290 2
Marsh v. *Alabama*, 326 U. S. 105 ..... 16, 18
Martin v. *Struthers*, 319 U. S. 141 18
McCollum v. *Board of Education*, 333 U. S. 263 ..... 17, 18, 93
Murdock v. *Pennsylvania*, 319 U. S. 319 ..... 16, 18
Ochoa v. *Hernandez*, 230 U. S. 319 31
Palko v. *Connecticut*, 302 U. S. 319 16
Pierce v. *Society of Sisters*, 268 U. S. 514 18
Powell v. *Alabama*, 287 U. S. 45 36
Prince v. *Massachusetts*, 319 U. S. 158 ..... 16, 20
Prudential Ins. Co. v. *Cheek*, 259 U. S. 530 2
Roberts v. *Anderson*, 66 Fed. (2d) 874 36
Saia v. *New York*, 334 U. S. 558 2
St. Nicholas Cathedral, etc. v. *Kedroff, et al.*, 302 N. Y. 1; 276 App. Div. 309; 192 Misc. 327 41
Shelley v. *Kraemer*, 334 U. S. 1 34
Stewart v. *Keyes*, 295 U. S. 403 37
The West Virginia School Board of Education v. *Barnette*, 319 U. S. 624 ..... 16, 18, 30
Trustees of Presbytery v. *Westminster Church*, 222 N. Y. 305 ..... 10, 51, 63, 77, 108, 127
United States v. *Carlene Products Co.*, 304 U. S. 144 ..... 16, 71
Watson v. *Jones*, 13 Wall. 679, ... 10, 19, 31, 51, 63, 74, 75, 77, 127
William Danzer Co. v. *Gulf R. R.*, 268 U. S. 633 31

CONSTITUTION AND STATUTES

Constitution of the United States, First and Fourteenth Amendments 2
Constitution of the State of New York, art. 6, sec. 7 24
Title 28, United States Code, secs. 1257, 2103 2

Page

Religious Corporations Law of the State of New York, Article 5-C (L. 1945, c. 693; am. L. 1948, c. 711) 1, 4
Civil Practice Act of the State of New York, secs. 605, 24, 34 ..... 24, 34

Works of Reference

Anderson: *People, Church and State in Modern Russia* 25
Bolshakoff: *The Christian Church and the Soviet State* 25
Casey: *Religion in Russia* 25
House Document #754: *Religion in the Soviet Union* 25
Morgan: *Judicial Notice*—57 Harvard Law Review 269 25
Phillips: *The Church in France, a Study in Revival* 8
Smith: *My Three Years in Moscow* 25
Timasheff: *The Great Retreat* 25

COURT OF APPEALS, STATE OF NEW YORK

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA,

Plaintiff-Appellee,

against

JOHN KEDROFF AND BENJAMIN FEDCHENKOFF, AS ARCHBISHOP OF THE ARCHDIOCESE OF NORTH AMERICA AND THE ALEUTIAN ISLANDS OF THE RUSSIAN ORTHODOX GREEK CATHOLIC CHURCH,

Defendants-Appellants

STATEMENT AS TO JURISDICTION

Appellants having presented this day their petition for appeal now file this, their statement, of the basis on which they contend that the Supreme Court of the United States has jurisdiction on appeal to review the judgments in question and to exercise such jurisdiction in this case.

The Statutory Provisions Which Sustain the Jurisdiction

The appeal is prosecuted from a judgment of the Court of Appeals of the State of New York, which is the highest court of the State of New York, in which a decision in the within matter can be had, and the judgment of the Supreme Court of the State of New York entered pursuant to the remittitur of said Court of Appeals. There is drawn into question the validity of Article 5-C of the Religious Corporations Law of the State of New York (Laws of 1945, c. 693, as amended, Laws of 1948, c. 711), on the ground that, as

construed and applied it is repugnant to the First and Fourteenth Amendments to the United States Constitution. The decision of the Court of Appeals was in favor of the validity of this statute. The Supreme Court has jurisdiction on appeal to review the final judgments in question by virtue of the express provisions set forth in Title 28 of the United States Code, Section 1257.

The cases which sustain the jurisdiction of the Supreme Court are:

Saia v. *New York*, 334 U. S. 558;
Kunz v. *New York*, 340 U. S. 290.

Additional Grounds of Jurisdiction

The appellants also contend that the judgment is founded on other errors apart from the above statutes, which, though they either are procedural or involve questions of substantive law not subject to review by this Court on appeal, nevertheless deprived the appellants of a fair hearing and constituted a denial of due process of law and a denial of the equal protection of the laws in violation of the Fourteenth Amendment. These errors are included in the assignment of errors and are set forth below at page 15. If they were the only errors complained of, the appellants would be limited to a petition for a writ of certiorari. They are included in this petition for appeal under the authority of Title 28, U. S. Code, Section 2103. *Flournoy* v. *Wiener*, 321 U. S. 253, authorized inclusion in assignments of errors on appeal "any other denial of federal right whether or not capable in itself of being brought here on appeal" (p. 263), in which event the non-appealable issues will be considered along with the merits of the appealable issues. (See *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530, 547.)

The Date of the Judgments Sought to be Reviewed and the Date on Which This Application for Appeal Is Presented.

The judgment of the Court of Appeals which is here sought to be reversed was rendered on November 30th, 1950. The judgment, pursuant to that Court's remittitur, was entered in the Supreme Court, New York County, on April 4th, 1951. Motion for leave to reargue the decision and judgment of the Court of Appeals was returnable in said Court of Appeals on January 15th, 1951. Said motion for reargument was seasonably made within the time limit allowed by the Court of Appeals. During the month of December, 1950, there was only one (1) motion date in the Court of Appeals, to wit, December 2nd, 1950; there were two (2) motion days in the Court of Appeals during the month of January, 1951, to wit, January 2nd and January 15th, 1951. By stipulation between the parties, the motion for reargument was made returnable on January 15th, 1951 to enable both counsel to give full consideration to the questions involved in the suit, particularly in view of the complexity thereof, and the intervening Christmas holiday. The Court of Appeals entertained and considered the motion for reargument on the merits and denied the same on the 9th day of March, 1951. This application for appeal is presented April 11th, 1951.

How Constitutional Questions Were Raised

The constitutional issues of this case were expressly considered by the Court of Appeals of New York as appears both from the opinions there rendered and from the Court's amended remittitur. In the latter, the Court stated:

> "Ordered that the motion for reargument be and the same is hereby denied. The remittitur is amended by adding thereto the following: Upon this appeal there

was presented and necessarily passed upon a question under the Constitution of the United States, viz, whether Article 5-C of the Religious Corporations Law, as construed by this Court, violated any rights of the defendants guaranteed by the First and Fourteenth Amendments of the Constitution of the United States. This Court held that the aforesaid statute did not violate any of the rights of the defendants guaranteed by those Amendments to the Constitution of the United States."

The above constitutional issues were raised before and considered by the Appellate Division (276 App. Div. 309, 316). The Trial Court having decided the case in favor of appellants and having held that the statute had no application to the case, found it unnecessary to discuss the consituational issue (192 Misc. 327, 333).

The Statute Involved

The statute is Article 5-C of the Religious Corporations Law of the State of New York (Laws of 1945, ch. 693, as amended by Laws of 1948, ch. 711). It deals with "Russian Orthodox Churches". Its full text is set forth in "Exhibit A" hereto. In substance:

(a) It defines a group of churches as a separate and autonomous religious body called the "Russian Church in America." Until April 1924, these religious organizations had belonged to a larger group constituting, under successive names, the American Diocese of the Russian Orthodox Church, and had theretofore been subject to the jurisdiction of the Most Sacred Governing Synod in Moscow and later the Patriarch of Moscow. In April 1924, at a convention in Detroit, this group of churches constituted themselves as an "administratively autonomous metropolitan district", and thus seceded from the American Diocese and from the Russian Orthodox Church to which the American Diocese remained subject (sec. 105).

(b) It defines a "Russian Orthodox Church" as a church, "Founded and established for the purpose and with the intent of adhering to, and being subject to the administrative jurisdiction of said mission, diocese or autonomous metropolitan district *hereinabove defined as the Russian Church in America*" (sec. 105).

(c) It provides for the government of *incorporated* Russian Orthodox Churches. It directs that "every" Russian Orthodox church in the State of New York, "whether incorporated before or after the creation of said autonomous metropolitan district . . . shall *recognize and be and remain subject to the jurisdiction and authority of the . . . archbishop or other hierarch or primate" and other "governing bodies and authorities of the Russian Church in America*" (sec. 107 (1)). And it gives to the trustees of every such Russian Orthodox church "the custody and control" of all its temporalities and property, and requires them to "administer" the same "in accordance with the . . . rules and statutes . . . of the Russian Church in America" (107 (3)).

By force of this statute as construed and applied by the Court of Appeals, appellant Benjamin, who was the Archbishop of the American Archdiocese of the Russian Orthodox Church, by appointment of the Patriarch and the Holy Synod, the Chief Authority of the Russian Church, and who was occupying St. Nicholas Cathedral of that Church, as such Archbishop, under the canon law of that Church, was ousted from such possession, and occupancy to the Cathedral was awarded to the appellee.

Statement Respecting Opinions

The Court of Appeals reversed the decisions of the lower courts in favor of appellants and directed judgment in favor of appellee by a vote of four to three. Three opinions were written. One majority opinion of the Court of Appeals was written by Judge Conway. A concurring opinion was writ-

ten by Judge Froessel and a dissenting opinion by Judge Desmond. Copies of the opinions are hereto annexed as "Exhibit B". They are reported in 302 N. Y. 1.

The Appellate Division ruled in favor of appellants by a three to two vote. Its opinions are annexed as "Exhibit C". They are reported in 276 App. Div. 309.

The opinion of the Trial Court is annexed as "Exhibit D". It is reported in 197 Misc. 327.

Statement Showing that the Nature of the Case and the Rulings of the Court Are Such as to Bring the Case Within the Jurisdiction Relied On.

This is a suit in ejectment. Appellee, a New York Corporation, holds the nominal legal title to St. Nicholas Cathedral in the City of New York. It represents a group of Russian Churches, who, in 1924, at a convention in Detroit, purported to secede from the Russian Church at large and organized themselves into an "autonomous metropolitan district". Appellant Benjamin was the Archbishop of the American Archdiocese of the Russian Orthodox Church, by virtue of his appointment to that office by the Patriarch, and he asserted the defense that, as such accredited Archbishop, under the canon law of the Russian Church, he had the exclusive right to occupy the Cathedral.

The Court of Appeals held (1) that the statute was "conclusive" and required the ouster from the Cathedral of appellant Benjamin, the appointed Archbishop; (2) that, absent the statute, the trial court, on a new trial should, because the Patriarchal Church is not "free", exercise its "discretion" to determine if the appointed archbishop is a "proper" person or "trustee" to administer the Cathedral; and (3) refused, while directing final judgment against him, to rule on the merits on appellant Benjamin's defense of the statute of limitations.

Title to the Cathredral was originally held in a New York corporation, Russian Orthodox St. Nicholas Church, of which the Russian Ambassador and the Consul General of New York were the sole trustees. In 1916, that corporation, by leave of the Court, gave the deed to the Cathedral to Archbishop Evodokim, the appointee of the Holy Synod. In the moving papers, the Archbishop and the trustees stated that the corporation held merely the nominal "title", that the beneficial ownership of the Cathedral was in the Russian Church under the management of the Archbishop, subject to the superior authority of the Holy Synod (1161-70). In 1917, Archbishop Evdokim retransferred the deed to the grantor corporation, which, in 1925, gave the deed, without any consideration, to appellee (411). After the decision in *Kedrovsky* v. *Rojdestvensky*, 214 App. Div. 483, affirmed, 242 N. Y. 547, which rejected the claim to the Cathredral by the Archbishop *elected* at the Detroit convention and awarded possession thereof to the Archbishop *appointed* by the central church authorities, appellee surrendered possession of the Cathedral in 1926 and about twenty (20) years later, in 1945, it brought this suit of ejectment.

Appellee's title is thus nominal only and does not carry with it the right of possession, which is determined by canon law. If, as seems clear, appellee's grantor could not have ejected Archbishop Evdokim from possession of the Cathedral, then appellee cannot oust his successor in office, Metropolitan Benjamin, unless article 5-C may constitutionally so authorize.

The extent to which that statute invades and destroys religious liberty can more readily be determined by examining the nature and status of the Russian Church at the time the statute was passed.

The Russian Orthodox Church

The Russian Orthodox Greek Catholic Church, hereafter referred to as the Russian Orthodox Church, is an hierarchal church and the supreme authority is vested in a Patriarch and Holy Synod. They in turn derive their authority from Sobors or general conventions of the Church (110-3).[1]

From the time of Peter, no Sobors were permitted by the Czars (597). Peter abolished the office of Patriarch and vested supreme authority in a Holy Synod, of which, his procurator was the chief official (110, 531-4). In 1917-18 the first Sobor since Peter's time was held in Moscow and that body restored the authority of the Patriarchate (112, 138, 597). There was a brief interregnum during the early years of the Russian Revolution, but by 1927, a Patriarchal Locum Tenens was in office, the Holy Synod was functioning again and the Patriarchal Church was re-established (188, 578, 593-4). The last Sobor was held in 1945 and the present Patriarch was then elected (111, 189, 595). The canonical validity of this Sobor and the Patriarch's election is not questioned (188-91, 593-4, 1230-7). The Patriarch is in full communion with all Christian Churches (597, 214).

The majority opinions stress the persecutions of the Patriarchal Church by the Soviets (302 N. Y. 1, 6-8), but the survival of that Church attests to its vitality and indestructibility. Like persecutions failed to destroy the French Church during the French Revolution. The aim of the leaders of the French Revolution was "the extinction of the Christian religion in general and of Catholicism in particular" (Phillips, *The Church in France, a Study in Revival,* p. 12). The lands of the Church were confiscated, the religious orders were suppressed, many of the clergy

[1] Numbers in parentheses refer to folios of the printed record.

were executed, the survivors were converted into civil servants, and the authority of the Pope over the Church was abolished (Phillips, *supra*, pp. 23-27). However, within a generation, the Church resumed its vital place among the French people. The same may be said of the Russian Church.

The American Archdiocese

The Russian Church first established itself on this continent at the end of the 18th century in the Aleutian Islands and Alaska at a time when these territories were part of the Russian Empire (113-4). When Alaska was ceded to this country, the authority of the Holy Synod over the Diocese of Alaska remained undisturbed. Thereafter, the church established a number of communities in this country and Canada.

At first, the Church here was called a Mission, then a Diocese, then an Archdiocese. The official name of the Archdiocese is "Archdiocese of the Aleutian Islands and of North America" (58-9, 114-7, 1127, 1198).

The Government of the Archdiocese

At first, the Church on this continent was governed directly by the Holy Synod (115), then through its agent, the Archbishop, who was an official appointed by the Synod (116, 152), answerable exclusively to it and subject to suspension, removal, transfer or replacement at the pleasure of the Synod (127-133, 819).

Under Russian Church law, which remains unaffected by any changes in temporal power, the Archbishop of the American Archdiocese is not *elected* by the local churches or clergy; they have no power to do so; he is appointed only by the Supreme Church Authorities of the Church at large (117, 152-6, 699, 702-3). In point of fact, all the

Archbishops who served here were in each instance *appointed* by the Supreme Church Authorities (129-31). Indeed, the appointment of the Archbishops was, prior to 1917, by ukase of the Czar (534). The Archdiocese was governed not by the local churches or clergy but by the Archbishop, and he was answerable not to them, but to the Supreme Church Authorities who appointed him.

Relation Between the American Archdiocese and the Church at Large

An Orthodox Church is not an aggregate or collection of separate or discrete parts, of parishes and dioceses, which are free to federate or separate at pleasure. An Orthodox Church is an indivisible whole. Indeed, it has no parts. It is a unity and, by hypothesis, no diocese or parish may of its own will leave the Church or, what is even less tolerable, consider itself a part of the Church and live "autonomously" or be "self-governing" without breaking the unity, the indivisibility, the integrality of the whole. There is and can be only one Russian Orthodox Church.

Canon law does not permit secession or fission in the church under this or that set of circumstances, for this or that reason; there is an absolute bar to such conduct (821). And those who by assertion of their own power undertake to secede or to be "autonomous" or "self-governing," cut themselves off from the church and all rights to its property (*Watson* v. *Jones*, 13 Wall 679; *Trustees of Presbytery* v. *Westminster Church*, 222 N. Y. 305).

Saint Nicholas Cathedral

This Cathedral was built about 1903 with money supplied by the Church in Russia and the Russian government, amounting to about $150,000. They contributed further substantial sums for its maintenance and upkeep (819, 122).

In 1905, the Cathedral was consecrated as the See of the American Diocese and the official residence, place of worship and headquarters of the Archbishop (63, 131).

The right of the duly accredited Archbishop of the American Archdiocese, appointed by the Supreme Church Authorities in Russia, as an attribute of his Episcopal office, to possess, occupy and use Saint Nicholas Cathedral as his residence, as a place of worship, and as the seat of his government of the Archdiocese, has never been questioned (820, 826-7, 131-2, 703). Even the majority opinion acknowledges as much (302 N. Y. 1, 4, 6). The testimony of the witnesses is unanimous on that point. All the appointed Archbishops have so occupied it (131). Defendant Metropolitan Benjamin is the accredited Archbishop by virtue of his appointment to that office by the Patriarch (669, Defdts.' Ex. C, 1097, 827). He has been occupying the Cathedral as such Archbishop since 1945 (704, 1198).

In *Kedrovsky* v. *Rojdestvensky*, 214 App. Div. 483, affirmed 242 N. Y. 547, which is identical with the case at bar and, apart from the statute, is decisive of the case, it was held that under the canon law of the Russian Church, Saint Nicholas Cathedral is held in trust for the Archbishop, *appointed by* the Chief Authorities.

Notwithstanding the above, the majority of the Court found that the Cathedral "has been dedicated to the use of members of a parish and of a diocese" or "dedicated to the use of all the members of the diocese" (302 N. Y. 1, 4, 34). This has the effect of converting the Russian Church from an hierarchal to a congregational body. Whatever rights the faithful may have in the Cathedral, they are subordinate to the rights of the canonical archbishop and cannot include the right to oust him because the Russian is not a congregational church.

The Metropolitan District

In 1924, a group of Russian churches on this continent met in a convention in Detroit and declared themselves to be "a self-governed Church • • • governed by its own elected Archbishop" and elected Platon (Rojdestvensky) as such Archbishop (931-3).[2]

This state of affairs was to continue "temporarily" i.e., until the convocation of an "All Russian Sobor (931) • • • under conditions of political freedom" (935), presumably in Russia. In the meantime, the decision was "not to break at all the spiritual ties and communion with the Russian Church, give her every cooperation and mention the Most Holy Patriarch as the Head of the Russian Mother Church" (934). The contradiction between regarding the Patriarch as the "head" of the Russian Church and at the same time attempting to expel his accredited Archbishop from St. Nicholas Cathedral, which was built for his exclusive use, is not resolved by appellee or the majority in the Court of Appeals.

This "self-governed Church" called itself an "autonomous metropolitan district."[3] In 1943, Metropolitan

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[2] The majority rely on the self-serving declarations of the orators at Detroit to justify the secession (302 N. Y. 1, 11-12). No doubt comparable speeches were made, seeking to justify the secession dealt with in *Watson* v. *Jones* (8 Wall. 679)—to no avail. The nub of the matter was stated by one speaker in Detroit who said, "We ourselves establish Church authority for ourselves" (914). But this was an impermissible breach of the canon law. The civil courts are concerned not with the *why* but only with the *fact* of secession and its legal consequences, viz, the loss by the seceders of the property under the control of the central church authorities.

According to the *Kedrovsky* record about 160 churches attended the Detroit convention. The record in our case is silent on the point. In 1945 this self governed church claimed 350 churches (1062) and in 1948 only 250 (796).

[3] This autonomy was not declared "pursuant" to the Patriarchal order of November 1920 (889-900), as the majority assert (302 N. Y. 1, 33, 12, 34). That order authorized temporary, local action by bishops of dioceses in

Theophilus was elected head of the District to succeed Platon who had died in the meantime (179-80). In 1936, the District subjected itself to the supreme authority of a group or Synod of bishops, domiciled in Karlovitz, Yugoslavia, calling themselves the "Russian Church Abroad", which purported to act as a rival to the Patriarchal Church outside of Russia (192, 601, 730, 764-8, 1223-8). The District pledged "loyalty" to this Synod of Bishops (1227-8), which first sought the restoration of the Czar, then joined its fortunes to those of Hitler (735-42, 606, 1214), and their "jurisdiction" went the way of that protector of religion (1225-9). With the liberation of Yugoslavia, the "Russian Church Abroad" followed Hitler back to Germany and their bishops settled in the Displaced Persons Camps in Germany (1211-12, 1224, 751). The Metropolitan District continued under the authority of this Synod while Hitler was in control of Yugoslavia and only withdrew from that organization in 1946[3a] (768, 1094) when the "Russian Church Abroad" had ceased to exist altogether (1125-7). As a result four bishops and a number of churches seceded from the District (834, 202, 1220).

The life history of the Metropolitan District is this: In 1924 it withdrew from the Russian Church at large, in 1936 it subjected itself to the authority of the Karlowitz Synod and in 1946 it seceded from that organization, resulting in a split in the Metropolitan District (769).

The Chief Authorities of the Russian Church at all times

Russia which were cut off "for reasons of movement of the front" (891) during the Civil War, had no application to the American Diocese and was not referred to in the resolutions at Detroit. In any event, any action taken thereunder had to be confirmed by the Patriarch (900) and all the actions of the metropolitan district, were not confirmed, but condemned (822-5).

[3a] The metropolitan district also "resolved that His Beatitude, Alexy, Patriarch of Moscow, and all Russia, be requested to continue us in his fold and be our Spiritual Head" on condition of autonomy.

took the position that the organization of the Metropolitan District and the actions of Platon and Theophilus in relation thereto violated "the canons, rules and usages of the Russian Orthodox Church and are null and void" (822, 825); in 1933, 1935 and on other occasions, they made formal rulings to this effect, and placed Platon and Theophilus and their associates under suspension which is still in force (822-6). Like rulings were made outlawing the Karlowitz Synod from the very beginning (601-4, 730).

Subsequent to the Sobor of 1945, negotiations between the Patriarch and the Metropolitan District proceeded up to the date of trial in 1948 for reunion (1344-50, 2081-3). These negotiations foundered on the purely ecclesiastical issue as to the extent of the Patriarch's power to confirm locally elected bishops (1118-20, 1069). The alleged "pledge of loyalty" to the Soviet Government had no bearing on the matter as the Appellate Division found (276 App. Div. 309, 319-20). This misnamed pledge was in reality, as Metropolitan Benjamin testified, a policy of "refraining from politics only . . . both in the church and in the name of the church" (650-1): that the "answer of the Russian Church is absolutely clear. It cannot prevent any citizen from fulfilling his obligations and does not demand it (657). . . . as individuals they may criticize, but they cannot do that in church, in the name of the church, because that would be injurious to the church" (659); that this was an "expression of the Christian attitude to the government" (617). This was also the position of the metropolitan district which admonished its clergy, "for the general welfare, not to touch upon political questions . . . especially from the pulpit" (1066).

The Constitutional Issues Presented

1. Is the ouster, by force of the statute, of Appellant Benjamin, the appointed archbishop, from St. Nicholas Cathedral, a violation of protected religious liberty?

2. Is such ouster, by force of the statute, a deprivation of property without due process?

3. Is the retroactive application of the statute to the case at bar, which was commenced one day *before* the statute became law (379-90), a denial of due process?

4. Is the direction that the trial court exercise its "discretion" to determine if the appointed archbishop is a "proper" person or "trustee" to occupy St. Nicholas Cathedral, a violation of protected religious liberty?

5. Does the failure and refusal of the Court of Appeals to rule on the merits of the appellant Benjamin's defense of the statute of limitations, violate due process?

6. Is the disposition of the case by the Court of Appeals on common law grounds a denial of due process?[4]

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[4] To find, by "judicial notice", that the Patriarchal Church is not "free" and to make that finding a "determinative" ground of the decision against appellants; to find that St. Nicholas Cathedral was dedicated "to the use of members of a parish and of a diocese" in the face of unanimous testimony that the Cathedral was built for and dedicated to the exclusive use of the appointed Archbishop; to use, as facts of recent Russian Church history, "vital" to the Courts' "duty . . . to identify the true and proper beneficiary" of the Cathedral (302 N. Y. 1, 4), testimony, not in the record in the case at bar, but offered by the defeated defendants in the *Kedrovsky* trial and *rejected* by the Appellate Division in that case (214 App. Div. 483, aff. 242 N. Y. 547); all this, we submit, is a denial of due process.

It may be that such denial of due process, because it is linked with a direction that the trial court exercise its "discretion" to determine whether appellant Benjamin is a "proper trustee" to occupy the Cathedral, does not, at this state of the case, possess the requisite finality for present review by the Supreme Court. However, if appellants are mistaken in this respect, they urge such denial of due process as one of the grounds for review by the Supreme Court.

ARGUMENT

I. The Statute, as Construed and Applied by the Court of Appeals, Constitutes an Abridgment of Freedom of Religion Guaranteed by the First and Fourteenth Amendments to the United States Constitution.

It is now settled that the States as well as Congress must obey the command of the First Amendment, to "make no law respecting an establishment of religion, or prohibiting the free exercise thereof, . . .".

The Supreme Court has characterized freedom of religion as "implicit in the concept of ordered liberty". (*Palko* v. *Connecticut*, 302 U. S. 319, 325); it has assigned to it a "preferred" position among our basic liberties (*Marsh* v. *Alabama*, 326 U. S. 501, 509; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 155; *Follett* v. *McCormick*, 321 U. S. 573, 577); it has reversed the rule of presumption, declaring that where the statute touches an area protected by the First Amendment, the presumption is *against* its validity (*The West Virginia School Board of Education* v. *Barnette*, 319 U. S. 624, 639; *United States* v. *Carlene Products Co.*, 304 U. S. 144, 152 note 4; *Prince* v. *Massachusetts*, 319 U. S. 158, 173; Murphy, J., dissenting).[5]

The Supreme Court has recently given expression to the principles which give religious freedom constitutional immunity from invasion by the civil power.

In *Everson* v. *Board of Education*, 330 U. S. 1, the Court affirmed the historic position of this country, ever since the adoption of the Constitution, that church and state shall forever be separated and said:

> (p. 15) "The 'establishment of religion' clause of the First Amendment means at least this: Neither a

[5] The Court of Appeals erroneously applied to Article 5-C the rule of presumption generally applicable to statutes concerned with commercial or like secular activities (302 N. Y. 1, 30).

> State nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion * * * Neither a State nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice-versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'."

The constitutional guarantee of religious freedom means, the Court further said, that the state shall be "neutral" in the field of religion (p. 18) and shall not "favor" or "handicap" one church as against another (p. 18).

McCollum v. *Board of Education*, 333 U. S. 263, reaffirmed the principles of the *Everson* case, and said:

> (p. 212) "For the First Amendment rests upon the premises that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective spheres or, as we said in the *Everson* case, the First Amendment has erected a wall between church and state which must be kept high and impregnable."

In his concurring opinion, Mr. Justice Frankfurter cited with approval the statement of Judge Jeremiah S. Black (note 8, p. 219):

> "The manifest object of the men who framed the Constitution of this country was to have a state *without religion* and a church *without politics*—that is to say, they meant that one should never be used as an engine for any purpose of the other." (Italics in original)

The constitutional guaranty not only protects religious belief, but also the "free exercise thereof". In *Cantwell* v.

Connecticut, 310 U. S. 296, the Court defined the "double aspect" of the constitutional guaranty as "freedom to believe and freedom to act", saying:

> (p. 303) "On the one hand it forestalls compulsion by law of acceptance of any creed, or the practice of any form of worship. Freedom of conscience and freedom to *adhere to such religious organization* or form of worship as the individual may choose, cannot be restricted by law. On the other hand it safeguards the free *exercise* of the chosen form of religion. Thus, the Amendment embraces two concepts—freedom to believe and freedom to act." (Italics added)

In other words, the governance of a Church as well as its creed is within constitutional protection.

Representative applications of the principles are found in the following cases:

Pierce v. Society of Sisters, 268 U. S. 514, sustained a parent's authority to provide religious with secular schooling, and the child's right to receive it, as against the State's requirements of attendance at public schools.

Cantwell v. *Connecticut*, (310 U. S. 296; *Marsh* v. *Alabama*, 326 U. S. 501; *Murdock* v. *Pennsylvania*, 319 U. S. 105; and *Martin* v. *Struthers*, 319 U. S. 141) and a number of like cases, have held restrictive of religious liberty, statutes or ordinances which have sought to impose taxes on, or to require licenses for, solicitation of funds for religious purposes or the sale or distribution of religious literature in public or private areas or similar evangelical activities.

The West Virginia School Board of Education v. *Barnette*, 319 U. S. 624, condemned, as an invasion of religious liberty, a requirement that children salute the flag in public schools.

McCollum v. *Board of Education*, 333 U. S. 203, barred the State from using its public school facilities to aid a

program of released time for religious instruction of children.

Particularly in point is the landmark case of *Watson* v. *Jones*, 13 Wall. 679, where this Court emphasized the incapacity of the civil power to sit in judgment on the jurisdiction of religious bodies or the nature of their actions, saying:

> (p. 730) "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority. The judgments, therefore, of religious associations, bearing on their own members, are not examinable here. * * *"[6]

The Court also pointed out (p. 727) that under our legal system, having in mind the fundamental principle of separation of church and state, all legal tribunals must accept as conclusive and final the acts, decisions and determinations of the chief authorities of a church, respecting any ecclesiastical matter whatever. There it was specifically held that all bodies of the Presbyterian Church were bound by the declaration of the Chief Authorities with respect to the controversial question of slavery and that a subordinate body of the Church could not lawfully secede and join the southern branch of the Church which had purported to establish a church organization independent of the main body and, in the event of secession, their property remains subject to the jurisdiction of the central church.

We thus see that the Supreme Court has been zealous to keep the exercise of religion and the governance of

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[6] The relation between a church and the Caesar of the moment involves matters of ecclesiastical policy and discretion and the judgment of the chief guardians of the Church in this respect is, under the doctrine of the above case, beyond judicial or legislative control.

Churches immune from the civil power, whatever be the form or method of attempted invasion.

The substance of the matter, we submit, was expressed by Mr. Justice Jackson in *Prince* v. *Massachusetts*, 321 U. S. 158, when he said:

> (p. 177) "Religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be."

Turning to the case at bar, Article 5-C, as construed and applied here, is, we submit, a gross and direct interference with religious liberty violative of the First and Fourteenth Amendments.

We do not have here a statute "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantive interest of the state" (*Cantwell* v. *Connecticut*, 310 U. S. 296, 311) but a general statute outlawing a Church in its entirety.

The canon law of the Russian church says that the archbishop appointed by the Patriarch must occupy St. Nicholas Cathedral. The statute says no; the archbishop elected by a seceding group of churches shall do so and, as a consequence, the accredited archbishop is ousted from possession and is barred from conducting religious services in the Cathedral.

The canon law says that a mission or diocese of the Russian Church, such as the American Archdiocese, is subject to the ecclesiastical government of the chief authorities and may not canonically secede from the church. The statute not only sanctions this but awards the Cathedral to the seceders, contrary to *Watson* v. *Jones, supra.*

The canon law says that a bishop shall be appointed by the chief authorities of the church or, if locally elected, shall be confirmed and consecrated by higher authority, so that the chain of apostolic succession may not be broken. The

statute requires all Russian churches, even though they question the regularity of the apostolic succession of the elected, but unconfirmed, archbishops of the seceders, to "recognize and be and remain subject to the jurisdiction and authority" of the seceders and such elected but unconfirmed archbishop.

The statute says that "every" Russian church and all its properties "shall be and remain subject to the jurisdiction" of the Metropolitan District and its elected archbishop, thereby dispossessing the Patriarchal church from all its properties and preventing any of its churches from existing in this state.

By this statute, the civil power departs from its position of "neutrality" in the field of religion and "prefers" the seceding group to the total exclusion of the Patriarchal church.

The statute literally establishes the Metropolitan District as the official Russian Orthodox Church in this state—an express violation of the First Amendment, which declares that the state "shall make no law respecting the establishment of religion . . ."

A statute that directs that the trustees of "every" Russian church in this state "shall administer" the properties of all such churches in accordance with the "statutes" and "rules" of the Metropolitan District "prohibits" the "free exercise" of religion by the Patriarchal Church as guaranteed by the First Amendment.

A statute that commands that a church "shall recognize and be and remain subject to the jurisdiction and authority" of one church instead of another, of one archbishop instead of another, is unconstitutional on its face.

The edict of Milan issued in 313 A. D. by Constantine, the first Christian Emperor of the Roman Empire, granted

> "both to the Christians and to all others, free power of following whatever religion each may have pre-

ferred. * * * The absolute power is to be denied to no one to give himself either to the religion of the Christians, or to that religion which he thinks most suited to himself" (*Drozda* v. *Bassos*, 260 App. Div. 408, 411).

The majority denies churches in the State of New York a freedom of affiliation which even the Roman Emperors allowed.

The official name of the Eastern Church is "The Holy Orthodox Catholic Apostolic Eastern Church." The Russian Orthodox Church is an integral, though autocephalous, part of this Catholic and Apostolic Church. The traditional position of the Russian Orthodox Church is that it is apostolic in origin and descent, that this apostolic succession is preserved through the institution of its Ecclesiastical Hierarchy in an unbroken succession from Christ and His disciples, that its bishops have been consecrated by those duly qualified and duly authorized by Higher Authority to perform this sacrament, and that there must be no defect anywhere in the line of descent for the transmission of grace.

Many believe, and with reason, that the Metropolitan District lacks apostolic succession and has no canonical standing; indeed, the Patriarch has so ruled. The status of Metropolitan Theophilus as a bishop is in doubt for his consecration was not authorized or confirmed by higher authority as required by canon law (171-2, 176-7), and he is now under canonical suspension. That the Metropolitan District itself felt and still feels an inner insecurity on that score, is shown by the memorandum, self-serving though it is, prepared by Professor Feodotov and his associates (Defendant's Exhibit I, 1221-42). That is why, in the hope of joining the Universal Church and acquiring apostolic succession, the Metropolitan District had subjected itself to the Karlo-

vitz Synod, on the theory that that body was a canonical hierarchy; but even that gossamer link (if it ever existed) with Universal Orthodoxy is now broken (1224, 1226, 1229-30), and the Metropolitan District is again in a canonical void. In these circumstances, for the civil power to direct all Russian Orthodox churches to "recognize" and subject themselves to the "jurisdiction" of a bishop and a District whose canonicity, whose apostolic succession, they may hold in doubt, is a grave intrusion into that field of conscience which is protected by the Constitution and the elementary decencies as well.

The Constitutional Questions Presented By This Appeal Are Substantial

We thus see that the statute, as construed and applied, penetrates the field of religious liberty on a deeper and wider front than any legislation heretofore attempted. In the words of the dissenting judges, the statute (302 N. Y. 1, 39),

> "had the precise and intended effect of freeing the whole Russian Orthodox religious community in America from its traditional submission to its supreme hierarchial head, of outlawing in New York so much of that community as remained submissive to the Patriarch, of putting the whole group and all its properties under the control of the new schismatic 'Russian Church of America', and, specifically, of mandating the ouster of the patriarchally appointed archbishop and the substitution of a rival claimant, not so appointed. We confidently assert that there is nothing in the statute itself to suggest such a legislative coup, that there is much to show that such was not the legislative purpose, and that the statute, if so intended and so construed, is plainly unconstitutional."

It is wholly unprecedented. "No other decision reaching such a result can be found in the books" (302 N. Y. 1, 36).

The basic error of the Court of Appeals is its purported finding, which it characterized as "determinative" (302 N. Y. 1, 22), that the Patriarchal Church is not "free", is not "a true religious body" and is "a tool" of the Soviet Government, and its ascription of such a finding to the Legislature by "presumption" (302 N. Y. 1, 24-30).

This presents the fundamental issue whether such a finding furnishes constitutional justification for the suppression of the Patriarchal Church and this embraces the question whether such a finding may be ascribed to the Legislature by "presumption", and this, in turn, involves the question whether such a finding was properly made in the first instance.

1. Such a finding has no basis in fact and is wholly arbitrary.[7] This finding was made on the Court's own motion in defiance of contrary evidence in the record and the contrary findings of the Appellate Division (276 App. Div. 309, 319-20) which is the ultimate authority on the facts, and was beyond the jurisdictional competence of the Court of Appeals.[8] Thus Metropolitan Gregory testified without cross-examination that the Patriarchal Church functions freely as an Orthodox Church without interference by the civil authorities (832). Patriarch Sergius emphasized the "contradiction" between the Russian Church and the Bolshevik regime (1029-32). Appellee's canonical expert accepted as correct the Patriarch's assertion that the Russian

[7] In point of fact, appellee did not raise this issue at the trial and offered no evidence on the Point (766-7). It was imported for the first time into the case by the minority in the Appellate Division, as the majority in that Court pointed out (276 App. Div. 309, 319), and was later adopted by the majority in the Court of Appeals.

[8] With exceptions not material here, the Court of Appeals has no power to make independent findings of fact and is bound by the findings of the Appellate Division, where, as here, there is evidence to support them, and is limited to rulings on questions of law (Constitution of the State of New York, art. 6, sec. 7; New York Civil Practice Act, sec. 605).

Church had not been "led astray" from "its correct and canonical consciousness" (578-9). In 1946, the Metropolitan District itself resolved that "His" Beatitude Alexy, Patriarch of Moscow and all Russia be requested to continue us in his fold and be our spiritual head" conditioned upon retaining autonomy (1092).

This "determinative" finding is based on "judicial notice" (302 N. Y. 1, 23-24), in spite of the above contrary evidence and findings, and notwithstanding that a substantial body of informed and non-partisan opinion supports a different view. (See chapter on *"Religion in the Soviet Union"*, pp. 127-32, in House Document #754, published in 1946, prepared by the Library of Congress; Casey, *"Religion in Russia"*, pp. 178, 182-90, Harper & Bros., 1946; Bolshakoff, *"The Christian Church and the Soviet State"*, pp. 55, MacMillan & Co., 1942; Timasheff, (Professor at Fordham), *"The Great Retreat,"* pp. 227, 237, Dutton & Co., 1946; Anderson, *"People, Church and State in Modern Russia"*, pp. 214, 92-4, Harper & Bros., 1944. Mr. Anderson says that the Russian Church "desires to be and feels itself to be the Church of the Russian people, not the Church of the Soviet State" (pp. 214). Former Ambassador Smith, in his, *"My Three Years in Moscow"*, Harper & Bros., 1950, states "while the Communist party has been successful in retaining that which is Ceasar's, its direct efforts to capture also that which is God's, has been quietly but decisively rejected by the masses of the Russian people" (pp. 264-5). He also refers to the "mysterious power of religion in Russia which is impelled by forces and governed by laws of its own which not even the Kremlin understands" (p. 279, 264-5)).

In such a case, findings by use of judicial notice are improper (Morgan, *"Judicial Notice"*, 57 Harvard Law Review, 269, 292-3). Indeed it is doubtful that a claim that a

church is not "free", a matter involving questions of judgment, discretion and ecclesiastical policy, is an appropriate subject for judicial notice at all.

When is a church not free? Was the Papacy free in Avignon? Was the Catholic Church free under Mussolini? The Protestant Church under Hitler? Is the Catholic Church free in Spain? Was the Karlovitz Synod, which the Metropolitan District accepted as its higher church authority from 1936 to 1946, free when Hitler ruled Yugoslavia? Can any state church, like the Church of England, be free? In a theocracy does the state govern religion or religion the state?

Was the Russian Church free under the czars? The majority apparently think so, for they regard the archbishops of the American Archdiocese, appointed prior to 1917, as "in proper and direct canonical succession"—notwithstanding that they were appointed by the Czar (534). Under the Czar, the Russian Church was a state church, supported by state funds, governed by the Czar through his civil procurator (531-4). Yet the majority regard such a church as free, but not the present church, notwithstanding that church and state are now officially separated, that Patriarch Sergius emphasized the "contradiction" between the Soviet government and the Orthodox Church.

The assertion of the majority that in 1927 Patriarch Sergius promised to "secure * * * written pledges of loyalty (to the Soviet government) from the clergy abroad." (301 N. Y. 1, 15) is not sustained by the record and does not support the claim that the Patriarch is not "free". The Patriarch, we submit, was addressing the Russian clergy when in 1927 he spoke of "our sincere readiness to be law abiding citizens of the Soviet Union, loyal to its government . . ." (1029-32), at the same time emphasizing that "we

cannot be silent about the contradiction which exists between us Orthodox and the Communist Bolsheviks who govern our Union" (1030).

A student of church history will recognize this as a statement of the classic position of the church with respect to any political or economic system. It is in full harmony with the recent pronouncement of His Holiness, Pope Pius, wherein he said that the Church "does not meddle in problems purely political and economic, nor does she deign to pass judgment upon the usefulness or the harm of one form of government or another" (New York Times, Feb. 21, 1949, p. 3). The Patriarch had, at first, anathematized the revolution, but when the Soviets became the *de facto* government he could not reverse the verdict of history. All churches are—they must be—"loyal" to the Ceasar of the day, that is, the clergy must be law abiding citizens and not political revolutionaries; the Orthodox Christian will be "always and everywhere" exemplary citizens of "any" state "including that of the Soviets" (1030). We respectfully submit that this position is in full conformity with the Christian tradition and should not be criticized by this Court.

2. Nor can such a finding be ascribed to the legislature by "presumption". Apart from the fact that, as we have seen, a statute touching religious liberty cannot be saved by presumptions, the asserted presumption in the case at bar has no factual support whatever, is wholly arbitrary and capricious.

What was the attitude of the legislature toward the Patriarchal church in 1945 when Article 5-C was passed? On that point, we have no direct evidence from findings, declarations of policy or legislative hearings. However, we do know that in 1945 the World War had not yet terminated, that the United States and the Soviet Union were still allies, that not even the beginnings of the present tensions were

discernible, that, just two years before, in 1943, the legislature had by Article XV and section 5 of Article 2 of the Religious Corporations Law, chosen the Patriarchal church, to the exclusion of the Metropolitan District, as one of the four "primary" Orthodox jurisdictions in this state, that Governor Dewey had publicly acknowledged Metropolitan Benjamin, the present defendant, as "the living suecessor" of the traditional, accredited archbishops of the American Archdiocese, and that the Metropolitan District was then subject to the Karlovitz Synod, which was allied with Hitler.

No facts are presented—and history records none—showing that the legislature had reversed in 1945 the favorable opinion of the Patriarchal Church which it held in 1943.

3. But assuming that the legislature made such a finding with respect to the Patriarchate, could it constitutionally outlaw that Church for such a reason?

The implications of such a position are far reaching indeed.

Is it within the constitutional competence of the legislature to pass judgment on matters of this kind? Has the legislature the power to suppress a church because it disapproves of the "politics" of the chief Hierarch? Is not the minority in the Court of Appeals right in saying that a statute which purports to do this is unconstitutional beyond dispute?

Let us examine *American Communications Ass'n.* v. *Douds,* 339 U.S. 382, which is the *only* case cited by the majority in support of its constitutional position. Section 9 (h) of the Management Labor Relations Act, withheld the privileges of the Act from those unions whose officers failed to file with the Labor Board an affidavit to the effect that they were not members of the Communist party. Chief Justice Vinson, for the majority, stressed the fact that,

after investigations before committees of Congress, including the committee immediately concerned with labor legislation, it was established by a "great mass of material" and "substantial amounts of evidence", that Communist leaders of labor unions had fomented "political" strikes in interstate commerce, that it was the intention of Congress, expressed in the declaration of policy in the Act, to curb such political strikes and other kinds of *direct action* and that the remedy proposed by Section 9 (h) bore a reasonable relation to the evil which Congress sought to and had the power to curb, namely, obstructions to commerce by political strikes.

Holding that "beliefs are inviolate" (p. 393), the court further observed that Congress did not restrain the activities of the Communist party as a political organization, did not bar Communists from employment or membership in unions, did not "attempt to stifle belief" (p. 404), but only to prevent illegal *action* (p. 396); that the effect of the statute on the exercise of basic freedoms was indirect, conditional and partial (p. 399), was "relatively small", touching only a "relative handful of persons" (pp. 397, 404.) Indeed, under Section 9 (h) Communists can lawfully be *officers* of unions; the only penalty in such case being, that such unions may not enjoy the benefits of the Act.

Where in our case are the investigations, the hearings, the findings and declarations of policy, the "mass", the "substantial amounts" of evidence, showing that the Patriarchal church, sanctioned and approved in 1943, has become an evil in 1945, which the legislature sought to suppress? There is not a shred of evidence that the Patriarchal church had *done* anything in this state justifying its proscription or that the legislature ever intended anything even remotely resembling suppression.

The position of the majority is, we submit, based on pure speculation—on an unsupported "presumption" of a non-existing "finding" of an imaginary "evil."

Freedom of religion may not be thus struck down.

The Clear and Present Danger Rule

The "clear and present danger" rule applies to restrictions on religious liberty (*Cantwell* v. *Connecticut*, 310 U. S. 296, 311; *The West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639). Assuming that the Patriarchal Church is not "free," is not a "true religious body," is a "tool" of the Soviet Government, it does not follow that occupancy of St. Nicholas Cathedral by the Patriarchal Archbishop, in accordance with the canon law of the Russian Church, is a danger to the state, so grave and imminent, that the state may lawfully prevent such occupancy, thereby nullifying the canon law that requires it and "prohibiting the free exercise" of religion by the Patriarchal Church.

Surely the questions presented by this appeal are substantial.

We do not defend Communism. No lawyer, trained in the Western tradition, could possibly do so. But Communism is not the issue, as the minority opinion shows. *Service to the law is the issue.* Opposition to Communism is not a mandate to bend the law in the supposed interests of the moment. We must not, ourselves, use those methods we profess to loathe in others.

The attack by the majority upon the Patriarchal Church is not merely unjustified but, we submit, entirely misplaced. Here is an institution, by tradition and principle, orthodox and conservative, with roots deep in the past. The church is now officially separated from the State. It is the only traditional institution that has survived attack by the Soviet government; and that government has been compelled to come to terms with what seems to be an indestructible force.

The church "has not been led astray" (578). The pronouncement of Patriarch Sergius is explicit about the "contradiction" between the Orthodox Church and Soviet State, and reveals an independence of spirit which was never asserted under the Czars. Does it not serve our highest interests to preserve an institution of this character, rather than go out of our way and gratuitously rain blows upon it?

II. The Statute, as Construed and Applied by the Court of Appeals Is a Taking of Property Without Due Process of Law in Violation of the Fourteenth Amendment to the United States Constitution.

If, by force of the statute, the right to use the Cathedral is taken from the accredited archbishop of the Mother Church and given to another, there would also be a taking of *property* without due process of law. The Cathedral was built by and maintained by the Mother Church with its money for the use of its archbishop. From the very beginning it has so been used. The Mother Church has (apart from its religious and canonical interest) a vested *property* interest in the Cathedral, and its use by it and its Archbishop, as his *residence* and as the headquarters of the diocese. Extinction of that interest and denial of such use by statute or by judicial decision on common law grounds, would be an unconstitutional deprivation of a vested property right.

It is hardly necessary to cite authority to show that a legislature may not transfer property from one person to another. That has always been deemed contrary to the Constitution:

Ettor v. *Tacoma*, 228 U. S. 148;
Ochoa v. *Hernandez*, 230 U. S. 139;
Forbes Pioneer Boat Line v. *Everglades Drainage District*, 258 U. S. 338;
William Danzer Co. v. *Gulf R. R.*, 268 U. S. 633.

III. The Retroactive Application of the Statute to this Action, Which Was Already Pending When the Statute Was Passed, Violates the Due Process Clause of the Fourteenth Amendment.

The present ejectment suit was commenced on April 9th, 1945 (379-80). The statute took effect April 10th, 1945, one day after this action was begun. In other words, this was a "pending" action when Article 5-C became law.

The statute is not retroactive. It does not say it is. It does not purport to be. As construed, it does not affect mere procedure but fundamental rights, already vested before the statute became law. Retroactive application of such a statute violates due process. See:

Forbes Pioneer Boat Line v. *Everglades Drainage District*, 258 U. S. 338;
Ettor v. *City of Tacoma*, 228 U. S. 148.

IV. The Direction by the Court of Appeals that the Trial Court Exercise Its "Discretion" to Determine Whether Appellant Benjamin Is the "Proper" Person or "Trustee" to Occupy St. Nicholas Cathedral, Violates His Religious Freedom Guaranteed by the First and Fourteenth Amendments.

If plaintiff is entitled to the Cathedral by force of the statute and, if it is constitutional, the above argument becomes academic.

But even if the statute is *un*constitutional, the above disposition of the case on common law lines, violates the constitutional guarantee of religious liberty, and should be reversed by the Supreme Court of the United States.

The Court of Appeals ruled that, apart from the statute, the disposal of the case on common law lines would require reversal with a direction that the trial court "exercise its

discretion along the lines herein indicated," *i.e.*, "whether Benjamin, the appointee of the central church authorities in Moscow, or Metropolitan Theophilus, the Archbishop of the North American metropolitan district, was the proper person to administer the temporalities of St. Nicholas Cathedral and whether he was the proper trustee"[9] to carry out "more . . . faithfully" the Cathedral trust (302 N. Y. 1, 24, 25).

Having already found that the Patriarchal Church was not "free," was not a "true religious body," etc., and having declined for that reason to follow *Watson* v. *Jones*, the direction that the trial court exercise its "discretion" in selecting the "proper" trustee, "along the lines herein indicated," is virtually a direction that Benjamin be rejected.[10]

But, be that as it may, and assuming the trial court had full discretion in the matter, such exercise of discretion would infringe on the guarantee of religious liberty. The Courts of New York are without power and have no discretion to determine who can function in the place of the canonically designated archbishop.

Under the canon law of the Russian Church, the appointed archbishop must occupy St. Nicholas Cathedral. If the civil courts, by the exercise of discretion or otherwise, bar such occupancy they interfere with religious liberty and violate the constitutional guarantee and the principles of *Watson* v. *Jones*.

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[9] Benjamin does not claim to be a "trustee" of the Cathedral. Plaintiff corporation, holding the legal title, is the "trustee". Benjamin claims to be the canonical beneficiary of the Cathedral trust. The Court of Appeals converts Benjamin from a beneficiary entitled to protection into an involuntary trustee subject to removal.

[10] The remission of the case to the trial court for the exercise of its "discretion" was a necessary formality since the Court of Appeals has no power to exercise discretion, but must rule on questions of law only.

Judicial decisions, no less than legislative, and executive acts must comply with the due process provisions of the Constitution.

Shelley v. *Kraemer*, 334 U. S. 1;
Backus v. *Fort Street Union Depot*, 169 U. S. 557;
Brinkerhoff v. *Hill*, 281 U. S. 673;
Chicago, B. & O. R. R. Co. v. *Chicago*, 166 U. S. 226.

V. The Failure and Refusal of the Court of Appeals to Rule on the Merits of the Defense of Limitations of Appellant Benjamin While Directing Final Judgment Against Him Is a Denial of Due Process of Law and Equal Protection of the Laws in Violation of the Fourteenth Amendment to the United States Constitution.

Even if the statute be held not to violate the guarantees of religious liberty, the above contention remains valid.

Appellant pleaded the applicable statute of limitations as an affirmative defense. (9-10). Under New York law, (New York Civil Practice Act, Sec. 34) the 15 year limitation applies to ejectment actions. Title to the Cathedral was transferred to plaintiff on April 17th, 1925 (1012). Its possession terminated April 2nd, 1926 (105-6, 163, 964-5). This action was commenced April 9th, 1945 (379-80). Hence, the defense is valid on its face and this action is barred.

At the trial (381-4, 388-95, 479-88, 940-1005, 1243-50, 1278-9) and on their appeal to the Appellate Division and the Court of Appeals (where the parties devoted many pages of their brief to this issue), plaintiff's *sole* contention was that the statute had been tolled, i. e. the "commencement" of this action in ejectment had been "staged" (New York Civil Practice Act, Sec. 24) by two injunctions; the permanent injunction in favor of Kedrovsky and against the two individual defendants in the *Kedrovsky* case, *supra*,

issued in 1926 and an alleged *temporary* injunction, dated July 1st, 1926, which it was claimed was granted in an action, based on said permanent injunction (968, 1247-8) by Kedrovsky as Archbishop against plaintiff (940-5, 100, 382-4). An unsigned, undated copy of this temporary injunction (940-5) was *excluded* by the trial court (480-1, 488); and, by means of an affidavit of plaintiff's counsel after the trial, plaintiff attempted to establish that such an injunction was issued and to reconstruct its terms (958-1002, 1278-9, 1243-50).

Appellant Benjamin contended at the trial and on both appeals, and on the motion for reargument, that these injunctions did not toll the statute.

Thus, plaintiff was not a party to the *Kedrovsky* case and the injunction there did not run against it (884-7). In any event, it enjoined only *physical* interference with Kedrovsky's possession of the Cathedral and did not, as plaintiff admitted (964-7), bar commencement of summary proceedings against Kedrovsky himself to recover possession of the Cathedral (1247-8). Similarly it did not "stay" the "commencement" of the ejectment action, i. e., service of a summons and complaint.

The alleged, excluded *temporary* injunction was, if issued, conditioned on an early trial (944, 73) and terminated when the main action lapsed (382). It also enjoined only physical interference (968-70, 1247-8), and, if it existed in the form asserted (940-5), it did not bar an ejectment action.

The trial court, the Appellate Division, and the minority in the Court of Appeals did not pass on the defense of limitations, but since they ruled in Appellant Benjamin's favor, it was unnecessary to do so. But when the Court of Appeals rendered final judgment *against* this appellant, it was bound to pass on this defense on the merits and its failure to do so in the original decision, and its refusal to

do so on the motion for reargument, which specifically requested a ruling on this issue, is a denial of due process.

The Court of Appeals thus summarily dismissed appellant Benjamin's defense of limitations: (302 N.Y. 1, 21)

> "Only the first (defense) need concern us here. The second, third and fourth defenses, i.e.: nonuser and lack of authority in plaintiff, the statute of limitations and laches, respectively, were either ignored, abandoned or found in plaintiff's favor. There was little or no discussion concerning them and they have been effectively eliminated from the case."

The above statement flatly contradicts the indisputable facts as to the defense of limitations. This defense was *not* "ignored, abandoned or found in plaintiff's favor". It was pleaded, it was litigated at trial, it was pressed on the appeals to the Appellate Division and the Court of Appeals and on the motion for reargument and the quoted statement of the majority opinion is plainly mistaken.

The defense of limitations is favored as a statute of repose (*Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 314).

Failure or refusal to pass on a properly raised defense, deprives a defendant of a fair hearing, it denies him the right to defend, and thus denies him due process of law. In analagous cases it was deemed a denial of due process to deprive a party in a civil action of representation by counsel of his choice (*Roberts* v. *Anderson*, 66 Fed. (2d) 874, 6; cf. *Cooke* v. *U. S.*, 267 U. S. 517, 537 and *Powell* v. *Alabama*, 287 U. S. 45), or even, under certain circumstances, to bar oral argument at a hearing (*Federal Communications Commission* v. *W J R*, 337 U. S. 265, 273-7).

If the Court's refusal to rule on the defense of limitations is based on the theory that the statute prevented the assertion of such defense, then the statute clearly denies due process. While it has been repeatedly held that a legisla-

ture may deprive litigants of the defense of limitations (*Campbell* v. *Holt*, 115 U. S. 620; *Chase Sec. Corp.* v. *Donaldson*, 325 U. S. 304), the cases which so hold recognize that the rule is different where, as here, rights in property have become vested by lapse of time. And this Court so held in *Stewart* v. *Keyes*, 295 U. S. 403. Besides, no court has ever suggested that it would be consonant with due process to deprive a particular individual of the right to plead limitations, yet preserve that right to all others. So it is not possible to uphold a construction of the statute which would here nullify the defense that was pleaded.

Respectfully submitted,

PHILIP ADLER,
Attorney for Defendants-Appellants.

PHILIP ADLER,
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EXHIBIT A

ARTICLE 5-C (New)

Russian Orthodox Churches

Sec.

105. Definitions.
106. Incorporation of Russian Orthodox churches.
107. Government of incorporated Russian Orthodox churches; powers and duties of trustees.
108. Reincorporation of existing corporations.

Article added by L. 1945, c. 693, eff. April 10, 1945.

§ 105. Definitions

The "Russian Church in America", *as that term is used anywhere in this article, refers* (is) to that group of churches, cathedrals, chapels, congregations, societies, parishes, committees and other religious organizations of the Eastern Confession (Eastern Orthodox or Greek Catholic Church) which were known as (a) Russian American Mission of the Russian Orthodox Church from in or about seventeen hundred ninety-three to in or about eighteen hundred seventy; (b) Diocese of Alaska and the Aleutian Islands of the Russian Orthodox Church from in or about eighteen hundred seventy to in or about nineteen hundred four; (c) Diocese of North America and (Alaska) *the Aleutian Islands (or Alaska)* of the Russian Orthodox Church from in or about nineteen hundred four to in or about nineteen hundred twenty-four; and (d) Russian Orthodox Greek Catholic Church of North America since in or about nineteen hundred twenty-four; and were subject to the *administrative* jurisdiction of the Most Sacred Governing Synod in Moscow until in or about nineteen hundred seventeen, later the Patriarchate of Moscow, but now constitute an *administratively* autonomous metropolitan district created pursuant to resolutions adopted at a general convention (sobor) of said district held in Detroit, Michigan, on or about or between April second to fourth, nineteen hundred twenty-four.

A "Russian Orthodox church", *as that term is used anywhere in this article,* is a church, cathedral, chaptel, congregation, society, parish, committee or other religious organization founded and established for the purpose and with the intent of adhering to, and being subject to the administrative jurisdiction of *said mission, diocese or autonomous metropolitan district hereinabove defined* as the Russian Church in America. Added L. 1945, c. 693; amended L. 1948, c. 711, § 1, eff. March 31, 1948.

§ 106. Incorporation of Russian Orthodox Churches

An unincorporated Russian Orthodox church in this state may be incorporated by executing, acknowledging and filing a certificate of incorporation, stating the corporate name by which such church shall be known and the county, town, city or village where its principal place of worship is or is intended to be located. There shall be attached to such certificate the permission to incorporate signed by the metropolitan archbishop or other primate or hierarch of the Russian Church in America, or by the locum tenens acting in his place. Such certificate of incorporation shall be executed and acknowledged by six lay members of such church.

On filing such certificate such church shall be a corporation by the name stated in the certificate. Added L. 1945, c. 693, eff. April 10, 1945.

§ 107. Government of incorporated Russian Orthodox (Church) *churches;* powers and duties of trustees

1. Every Russian Orthodox church in this state, whether (heretofore or hereafter) incorporated *before or after the creation of said autonomous metropolitan district,* and whether incorporated or reincorporated pursuant to this article or any other article of the religious corporations law, or any general or private law, shall recognize and be and remain subject to the jurisdiction and authority of the general convention (sobor), metropolitan archbishop or other primate or hierarch, the council of bishops, the metropolitan council and other governing bodies and authorities of the Russian Church in America, pursuant to the statutes

for the government thereof adopted at a general convention (sobor) held in the city of New York on or about or between October fifth to eighth, nineteen hundred thirty-seven, and any amendments thereto and any other statutes or rules heretofore or hereafter adopted by a general convention (sobor) of the Russian Church in America and shall in all other respects conform to, maintain and follow the faith, doctrine, ritual, communion, discipline, canon law, traditions and usages of the Eastern Confession (Eastern Orthodox or Greek Catholic Church).

2. The six lay members of every church incorporated pursuant to this article signing the certificate of incorporation and the rector shall be the trustees of such church for the first year or until their successors are selected according to the by-laws of such church or the rules and usages of the Russian Church in America.

3. The trustees of every Russian Orthodox church shall have the custody and control of all temporalities and property, real and personal, belonging to such church and of the revenues therefrom and shall administer the same in accordance with the by-laws of such church, the normal statutes for parishes of the Russian Church in America approved at a general convention (sobor) thereof held at Cleveland, Ohio, on or about or between November twentieth to twenty-third, nineteen hundred thirty-four and any amendments thereto and all other rules, statutes, regulations and usages of the Russian Church in America. Added L. 1945, c. 693; amended L. 1948, c. 711 § 2, eff. March 31, 1948.

§ 108. Reincorporation of existing corporations

Any heretofore incorporated Russian Orthodox church may reincorporate under the provisions of this article, by filing in the office of the county clerk in the county in which its principal place of worship is located, a certificate, signed by the trustees in office at the time of such reincorporation, or by the majority of them, setting forth that they desire to reincorporate under the provisions of this article, the corporate name by which such church shall be known, the county, town, city or village where its principal place

of worship is located and the number and the names of the trustees who are to hold office until the next annual meeting of said church. Immediately upon the filing of such certificate all the right, title, equity and interest of such church in any estate, real or personal, together with all franchise and charter rights, shall be vested in the body corporate and politic so created under this article and the original incorporation of such church shall be null and void. Added L. 1945, c. 693, eff. April 10, 1945.

Explanation—The amendment of 1948 added the words that are underscored and omitted the words in parenthesis.

EXHIBIT B

NOT FOR PUBLICATION

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA, Appellant, *v.* JOHN KEDROFF and BENJAMIN FEDCHENKOFF, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church, Respondents.

Decided November 30, 1950.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 25, 1950, affirming, by a divided court, a judgment of the Supreme Court in favor of defendants, entered in New York County upon a dismissal of the complaint by the Court at a Trial Term (BOTEIN, J.; opinion 192 Misc. 327) without a jury, at the close of the entire case.

RALPH MONTGOMERY ARKUSH for appellant.

PHILIP ADLER for respondents.

CONWAY, J. In 1903, a church was built at 15 East 97th Street in New York City, title to which was held by a corporation, created in 1899 under the Religious Corporations Law of this State and named "Russian Orthodox St.

Nicholas Church in New York". The church was constructed with funds supplied partly from abroad and partly from local contributions and it was dedicated to the use of the members of the local congregation of the Russian Orthodox Church in New York City established in 1893. Two years later in 1905, the See of the Russian Orthodox Diocese of North America and the Aleutian Islands was transferred from San Francisco to New York and St. Nicholas Church became a cathedral occupied by the ruling bishop of the North American Diocese and dedicated to the use of all the members of the diocese as a central place of worship of the Russian Orthodox Church in North America. This cathedral is the subject of the present controversy. Simply stated, it is our duty in this action to identify the true and proper beneficiaries at the present time of such dedication of the cathedral so that there may be proper administration of this religious trust. In a roaching that task, it is vital to our inquiry that we unde. stand the history and organization of the Russian Orthodox Church, and the origins of its difficulties in modern times as disclosed in the record here and the record in *Kedrovsky v. Rojdesvensky* (242 N. Y. 547), which was submitted to us upon the argument.

The Russian Orthodox Church is one of that loosely knit group which generically is referred to as the Eastern Confession or the Eastern Orthodox Church—an allusion to the rupture of the eastern and western portions of the Catholic church in 1054. The Russian church originally was subject to the Patriarch of Constantinople but acquired greater autonomy when Constantinople fell to the Turks and the Metropolitan of Moscow was no longer appointed by the Patriarch of Constantinople but was elected by the Russian bishops. Finally, express recognition of the "autocephaly", i.e., the complete independence, of the Russian church came in the 16th century when the Metropolitan of Moscow was raised to the dignity of Patriarch. The Patriarch ruled the church until 1700 when Peter the Great forbade the election of a new Patriarch and established the Most Sacred Governing Synod, consisting of a Procurator appointed by the Czar, and several metropolitans and bishops, to govern the church in place of the Patriarch. This form

of church government continued for over two hundred years, until 1917.

During that period, the Russian Orthodox Church conducted missionary activities in many parts of the world. A mission was established in 1793 in the then Russian territory of Alaska, and spread down the Pacific coast. In 1870, the mission had grown to the extent that the Diocese of Alaska and the Aleutian Islands was created, with its See at San Francisco. Since it extended from Alaska through Canada to San Francisco, we shall refer to it herein as the North American Diocese or as the diocese.

A New York City congregation of the Russian Orthodox Church was established in 1893, incorporated in 1899, as already noted, and completed St. Nicholas Church in 1903. In 1905, when the See of the diocese was moved from San Francisco to New York, the church became a cathedral, occupied, in accordance with the rules of the church, by the ruling bishop of the diocese. Throughout that period, the paramount jurisdiction of the Most Sacred Governing Synod in Russia over the North American Diocese was recognized and unquestioned.

Such was the condition of the Russian Orthodox Church and its North American Diocese until 1917—the year of the Kerensky revolution in Russia.

Following the overthrow of the czarist regime, a great "Sobor" or convention of the Russian Orthodox Church was called. This sobor of 1917-18, it is conceded here by all parties, had indisputable canonicity and validity. The sobor re-established the Patriarchate and elected thereto Patriarch Tikhon, the "arch-prelate" and "head of Church Administration", the first such since Peter the Great. The Patriarch, as the head of the Sacred Synod and of the Supreme Church Council, constituted the Supreme Church Authority and ruled the Russian Orthodox Church. Other enactments of the sobor provided a procedure for the local election of diocesan bishops and the confirmation of such election by the Supreme Church Authority. It also provided that the Patriarch might call a sobor every three years and that he should preside over it. No sobor was

ever called by Patriarch Tikhon (and he was the only one with power to do so) prior to his death in 1925.

Up to 1917, the ruling archbishop of the diocese had been appointed by the central church authorities. Tikhon himself, later to be Patriarch, was the diocesan archbishop from 1904 to 1907. Archbishop Platon succeeded him and ruled until 1914 when he returned to Russia and Archbishop Evdokim came in his stead. Archbishop Evdokim remained until 1917 when he too returned to Russia. All three duly appointed archbishops, in conformity with the rules of the Russian church, used and occupied St. Nicholas Cathedral, as their administrative headquarters and as a place of worship. Those three archbishops were in proper and direct canonical succession and as to that there is no controversy.

Archbishop Evdokim's departure in 1917 marked the beginning of the difficulties which have ever since beset the diocese. No discussion of the Russian Orthodox Church since 1917 is possible without constant reference to the political conditions upon which its character and its existence depended. In March of 1917, the Provisional Government of Kerensky replaced the czarist regime. The Kerensky Government itself was soon overthrown by the so-called Bolsheviki led by Lenin in the famous "October Revolution". Prior to his downfall, Kerensky, as noted, had authorized the convocation of the great sobor of the Russian Orthodox Church, which was in session through the latter part of 1917 and up to February of 1918 and which named Tikhon as Patriarch. Upon their accession to power, the Bolsheviki, in accordance with the then acknowledged and asserted principles of communism, attempted by every means at their command, to destroy religion in Russia. In the years following 1917, church property was confiscated, clergymen were killed, exiled or imprisoned, and Patriarch Tikhon himself, old and in poor health but a useful symbol, too valuable to be destroyed, was confined under house arrest and later imprisoned.

This frontal attack upon the church continued for five years. In November of 1920, however, at the height of the persecution, Patriarch Tikhon issued his now famous ukase No. 362 of 1920. This document contained "instructions to

the Diocesan Bishops for the case that a given Diocese be severed from the highest Church Administration, *or in case the latter's activity stop*". (Emphasis supplied.) It was provided in part that "if the highest Church administration * * * would for any reason discontinue their church-administrative activity", the diocesan bishop, either with the bishops of neighboring dioceses or, if that were not possible alone, should "assume the full hierarchical power" and "do everything possible to regulate the local church life, and if necessary, * * * organize the diocesan administration suitable to conditions created". Other paragraphs provided for the continuation of such local administration of the church if the discontinuance of activity of the highest church administration "should acquire a protracted or even permanent character". Finally, it was provided that "all measures taken locally in accordance with the present instructions * * * must be submitted for confirmation later to the Central Church Authority when it is re-established."

The apparent forebodings of Patriarch Tikhon, which prompted this ukase, proved accurate, for in the Spring of 1922 he was arrested and imprisoned. The Russian Government, then, for its own purposes, as later became evident, permitted a group of priests to visit Tikhon and they procured from him a letter authorizing the transfer of certain *business papers* of the church to a named archbishop (Agathangel) who was to be his representative. Instead of doing that, the recipients of the letter—members of a radical group styling themselves the "Living" or "Renovated" church—declared themselves to be the Supreme Authority of the Russian Orthodox Church and purported to authorize and summon the pseudo-sobor of 1923. Patriarch Tikhon later referred to them as "ambitious and willful men" who took advantage of the situation "to usurp the highest clerical power of the Russian Orthodox Church which did not belong to them," and he denounced their statements as "nothing but lies and deception". It is now conceded here that this was a schism which is now extinct. Nevertheless, while Tikhon was still in prison, this schismatic group purported to call another sobor of the church although power so to do resided only in the Patriarch

Tikhon, as we have seen. There is evidence that they were aided and abetted in their plan by the Russian Government which permitted them to proceed while killing, arresting or exiling those members of the church who objected. This new pseudo-sobor met in 1923.[11] Tikhon was roundly and vehemently condemned by all the speakers. The patriarchate was dissolved and Tikhon, reviled and denounced as an apostate and traitor, was unfrocked. The church created by the pseudo-sabor of 1923 was called the "Living Church" or the "Renovated Church". It was schismatic and had no canonical validity. That fact, it should again be noted, is conceded by all the interested parties here.

The turmoil and the turbulence with which the Russian Orthodox Church was beset in Russia was not without its echoes in this country. Bishop Alexander of Canada became acting head of the diocese by designation of Archbishop Evdokim (see p. 3, herein). Several conventions were held in this country at which the status and fate of the North American Diocese were discussed and measures were proposed to preserve it from disintegration or the usurpation of pretenders. Archbishop Platon, who had ruled the diocese from 1907 to 1914, in proper canonical succession, returned to this country in 1921. He succeeded in restoring peace and order in the diocese, and prominent churchmen of the diocese urgently petitioned Patriarch Tikhon to reappoint him formally as archbishop of the diocese. This was just before Tikhon was actually imprisoned. While he was technically at liberty, his visitors

[11] The minutes of its deliberations contain frequent obsequious expressions of praise of and devotion to the Soviet Government. Lenin was referred to as "the world's leader" and the Soviet Government was said to be "the only one in the world of all time of the existence of mankind, to fight actually for good and equality." A resolution was adopted which declared that the world was divided into two classes—the capitalist exploiters and the proletariat—and continued: "The Christians cannot be indifferent spectators of that battle. The Sobor declares capitalism to be a mortal sin, and a battle with capitalism to be holy to Christians. In Soviet Authorities the Sobor sees a world's leader for fraternity, equality and peace of nations. The Sobor stigmatizes the international and national counter-revolution and condemns it with all its religious and moral authority". Christians "through the entire world" were called upon to "bring into life the principles of the October Revolution."

in Moscow were being watched and interrogated carefully, and his correspondence, especially with Americans, was systematically searched. The American entreaties regarding Archbishop Platon were relayed to the Patriarch by a representative of the Y. M. C. A. who was in Moscow. The Patriarch, in the presence of another witness, Bishop Pashhovsky, assured him that Platon would be appointed the ruling bishop of the diocese and that he would issue papers to that effect. The Patriarch asked that Platon be notified immediately, but it was agreed that it would not be possible at that moment to put the appointment in writing because of the constant surveillance of the civil authorities and the fear that any such communication, if seized, would endanger the safety or the life of the Patriarch. The Patriarch's intention and will were transmitted to Archbishop Platon by the Y. M. C. A. representative and Bishop Pashhovsky. Alexander, the acting Archbishop, recognized in writing Platon's appointment as ruling bishop of the diocese, as did the bishops of the church outside Russia. Tikhon was imprisoned by the Soviet Government immediately after making this oral appointment. A diocesan convention was held at Pittsburgh in October, 1922, and after investigating the situation Platon was acknowledged as the ruling bishop. Platon accordingly took possession of St. Nicholas Cathedral and exercised administrative supervision over the diocese.

Patriarch Tikhon was released from prison in the latter part of 1923, after the pseudo-sobor of that year had completed its work. Under date of September 20, 1923, from a monastery, he signed an order directed to Platon advising him that, *with the concurrence of the Sacred Synod*, "having taken cognizance of the situation of the American Church, we deemed it necessary to appoint you to rule the North American Church."

Meanwhile, one John Kedrovsky, a priest of the Russian Orthodox Church in this country, had, in 1918, commenced an action in this State on behalf of himself and other priests against the association or corporation known as the Archbishop and Consistory, which was a managing and advisory group handling the affairs of the diocese. In that complaint

Kedrovsky asserted that he was one of the clergy of the Russian Orthodox Greek Catholic Church of North America; that it was a religious denomination of about 300 churches with about 300,000 members organized in various unincorporated parishes or bodies throughout North America;[12] that his lawful archbishop was Archbishop Evdokim (Meschersky) who had departed from the United States for Russia about August 6, 1917, and had since remained there; that Alexander (Nemolovsky) was then a bishop of the church in Canada and had been assuming to act as the acting archbishop of the church pursuant to a cablegram from the lawful Archbishop Evdokim but that in truth no such appointment had been made by Archbishop Evdokim and that Alexander was therefore a usurper.

After the institution of that action, but before trial, the aforementioned psuedo-sobor of 1923 was held in Moscow. It created the "Living Church" or "Renovated Church", which, as noted, is now conceded to have been schismatic and uncanonical. Kedrovsky, the same priest who in his 1918 action had asserted that he was subject to Archbishop Evdokim as the true archbishop of the North American Diocese, procured from this "Renovated Church" certain credentials in the latter part of 1923. One document purported to consecrate him as North American archbishop and to excommunicate and condemn Archbishop Platon. The other documents contained Kedrovsky's formal appointment as archbishop of the North American Diocese and a full power of attorney to act for the church.

In March, 1924, he commenced another action, this time asserting that he was the lawful archbishop of the North American Diocese, in order to gain control of St. Nicholas Cathedral, the subject premises in the case at bar, which he then conceded had been possessed by Bishop Alexander in 1919 "as the de facto or acting Archbishop". As noted, Archbishop Platon was occupying the cathedral in 1924 by

[12] On the trial, he introduced in evidence an exhibit which listed deeds of 135 church properties to Bishop Alexander in Alabama, Alaska, California, Colorado, Connecticut, Illinois, Indiana, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Washington and Wisconsin.

virtue of his oral appointment by Patriarch Tikhon and the written confirmation thereof in September, 1923.

In March of 1924, immediately prior to the institution of the cathedral action by Kedrovsky, a document, dated February 16, 1924, appeared in the newspapers here purporting to have been issued by the Patriarch Tikhon accusing Platon of engaging "in Public acts of Counter-Revolution directed against the Soviet Power and of disastrous consequences to the Orthodox Church". It provided for the dismissal of Platon "from the day on which this Present Decision is announced to him", by a new ruling bishop who was to be chosen. The publication of this decree, dated less than five months after the patriarchal order confirming Platon and the legal action instituted by Kedrovsky, caused bewilderment among the members of the diocese. A North American sobor was called and held at Detroit in April of 1924 to consider the situation, excerpts from the minutes of which appear in the record.[13]

It was pointed out that the North American Diocese, for a good many years, had been "cut off from the highest

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[13] The purported new order of the Patriarch was compared with his recent decree confirming Archbishop Platon, the language of the new order was analyzed and found to be couched in terms similar to those used by the schismatic Kedrovsky, and there were comments upon the very serious condition of the Patriarch's health. (He did, in fact, die the next year, in April of 1925.) It was concluded that "somebody in Moscow is extracting decrees from the sick Patriarch and is using those decrees against him", and in particular that the decree of February 1924, was "undoubtedly forced by the Soviet power". Another speaker stated: "The fact that the Soviet power still tolerates Patriarch Tikhon is only because he is an achievable means of influencing opinion at home and public opinion abroad. I have not the slightest doubt that all the Patriarch now does to administer the Patriarchate he is doing under duress. Over there it is done very simply: he is summoned to the respective commissariat and presented with decrees prepared beforehand which he is 'to execute'. As everything is done to 'consolidate the conquests of the revolution' his refusal to comply with the demands of the Soviet power will be openly called counter-revolution and sabotage." It was said that if such forced acts of the Patriarch continued, the North American Diocese would be subject to "all kinds of surprises, which could basically undermine that church order and

organ of the administration of the Russian Church" and that that situation made operative the above-quoted ukase of 1920 providing for local administration and election of bishops. The sobor then adopted resolutions asking Platon to head the administration of the church. Another resolution emphatically stated it to be the will of the sobor "not to break at all the spiritual ties and communion with the Russian Church but always to pray for her good". The "final regulation" of the status of the North American church was to be left to "a future Sobor of the Russian Orthodox Church which will be legally convoked, legally elected, will sit with the participation of representatives of the American Church under conditions of political freedom, guaranteeing the fullness and authority of its decisions for the entire Church, and will be recognized by the entire Oecumenical Orthodox Church as a true Sobor of the Russian Orthodox Church."

The second or 1924 action brought by John S. Kedrovsky reached us two years before the 1918 action brought by him. In that 1924 action there was evidence as to most of the facts already detailed. However it was not there conceded as it is now that the "Renovated Church" had been schismatic in origin and had been later absorbed by or merged with the patriarchal church, nor that the 1923 sobor was not considered as having complied with canonical requirements because it was not convened pursuant to a call by the Patriarch and the Holy Synod. Moreover, in that action there was not before the court ukase No. 362 of 1920 of Patriarch Tikhon. The Appellate Division (214 App. Div. 483) stated that "The validity of Kedrovsky's appointment really depends upon the validity of the second Sobor [that of 1923] as it is called." (P. 487). It then found (contrary to what is now conceded to be the fact) that the sobor was properly called and that the "Renovated

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peace which have, with such great labor, already been practically arranged" by Archbishop Platon, and "would involve our Church here in a condition of that same anarchy under the banner of which church life in Russia exists at present * * * We must create our own firm Church administration, completely insured against possibility of the direct or indirect influence of the Soviet Power."

Church", created by it, had the power to appoint Kedrovsky as the ruling bishop of the North American Diocese. When the appeal from that decision reached us we treated it as one involving only questions of fact as to whether (1) there was a governing body of the church and whether (2) that governing body had recognized Kedrovsky as archbishop of the church. We determined that there was evidence to sustain the findings of the Appellate Division on both of those points. We thereupon affirmed the judgment, one Associate Judge being recorded as absent. (*Kedrovsky* v. *Rojdesvensky* [1926], 242 N. Y. 547.) The control of all phases of Russian life by the Government was not as apparent in 1924 as it is a quarter of a century later and on the surface, at least, the case appeared to be a proper one for the application of the rule that in an ecclesiastical dispute involving a denominational church, the decision of the highest church judicatories will be accepted as final and conclusive by the civil courts (*Trustees of Presbytery of N. Y.* v. *Westminster Presbyt. Church,* 222 N. Y. 305, 315; *Watson* v. *Jones,* 13 Wall. [U. S.], 679, 724-727; Religious Corporations Law, §§ 4, 5).

Two years later there was presented the original or 1918 action commenced by Kedrovsky, as a priest of the patriarchal church, on behalf of himself and all others similarly situated. It had been brought against the "Archbishop and Consistory of the Russian Orthodox Greek Catholic Church, alleged corporation", and others. Archbishop Platon (Rojdesvensky) was again an appellant. In that action a receiver *pendente lite* had been appointed and the judgment at Special Term directed that the defendant Platon and other defendants deliver over to such receiver, who in turn was directed to deliver to plaintiff John S. Kedrovsky, all the properties and deeds thereto held by Bishop Alexander and conveyed by him to the general board of trustees by the exhibit dated June 7, 1921, which listed and enumerated all of the 135 church properties in the nineteen States and the territory of Alaska heretofore referred to. That judgment was unanimously affirmed by the Appellate Division. We, however, granted leave to appeal. The decision of the Appellate Division there was correct and

unassailable if by our affirmance in *Kedrovsky* v. *Rojdesvensky* (242 N. Y. 547, *supra*), we had adopted the view that the properties of the North American Diocese were required to be administered by an appointee of the central authorities of the patriarchal church as it then existed in Russia, whatever the status and characteristics of the church there might be, and that Kedrovsky had been validly appointed by such authorities. We, however, declined so to consider our earlier affirmance in the cathedral case two years before. Realizing that the legitimate claims of the North American Diocese, whose temporary autonomy had but recently been declared, were entitled to consideration under the circumstances disclosed, we unanimously reversed the judgments below. (*Kedrovsky* v. *Russian Catholic Church* [1928], 249 N. Y. 75.)

We pointed out that the title to the properties "was either in Archbishop Nemolovsky [Alexander] for the benefit of the faithful of the church within his diocese, or in the defendants [Platon and the general board of trustees] to whom he attempted to transfer his trusts * * *, or in the faithful of the church themselves." (p. 77.) We further noted that in none of those views was title in the members of the Consistory, then headed by Kedrovsky. Then, taking cognizance of the doubt as to Kedrovsky's status as archbishop by appointment of the "Renovated Church", and of the declaration of administrative autonomy by the American church at Detroit in 1924, we said (pp. 77-78): "In view of the dissensions that have arisen, the Supreme Court may well conclude that the title should be vested in some other trustee who may be relied upon to carry out more effectively and faithfully the purposes of this religious trust (*Carrier* v. *Carrier*, 226 N. Y. 114). Whether such trustee should be the plaintiff, who is the present Archbishop, or the incorporated Archbishop and Consistory, or some one else, we do not now determine. This question is one to be passed upon by the Supreme Court in its discretionary supervision of the conduct of trustees. That discretion has not been exercised by any judgment yet pronounced. * * *"

That 1928 decision by this court thus recognized that

the difficulties of the Russian Orthodox Church in this country differed substantially from the situations presented in the *Westminster* and *Watson* cases (*supra*), and that those cases were not helpful in the solution of the problem. The problem, indeed, was one which strained the limits of judicial power, and, we deemed it proper to return the case to the Supreme Court leaving it to that court, after full consideration of the facts, in the exercise of its discretionary power, to achieve a result whereby the faithful of the Russian Orthodox Church in this country might enjoy their accustomed religious temporalities under the supervision of trustees who might "be relied upon to carry out more effectively and faithfully the purposes of this religious trust".

While this litigation was in progress, the Soviet sponsored "Renovated Church" was the only one permitted to function in Russia, the central office of the patriarchal church being suppressed by the Government. Despite this State assistance, the "Renovated Church" had no popular following and few adherents outside its own clergy. In a few years it joined with and was absorbed by the patriarchal church. For two years, after Tikhon's death in 1925, there was no Patriarch of the Russian Orthodox Church. Then in 1927, one Sergius, the Metropolitan of Moscow, made peace with the Soviet Government and concluded an agreement with it under which the central office of that church was permitted to reopen, after acknowledging its "loyalty" to the Government and promising to secure similar written pledges of loyalty from the clergy of the church abroad. No election to fill the office of Patriarch was permitted. Instead, Sergius was appointed the acting *locum tenens* of the patriarchal throne. Unsuccessful discussions subsequently ensued with a view toward reuniting the North American metropolitan district with the patriarchal church.[14]

Under the leadership of Metropolitan Platon following the creation of the administratively autonomous metropol-

[14] The position of the Russian church in America appears to have been that no such pledge of loyalty to the Russian Government as demanded could be given by the clergy here and that the church in Russia was be-

itan district by the Detroit sobor of 1924, to which reference will be made hereafter, the church grew and prospered. With the exception of schismatics such as Kedrovsky, who was recognized by no one but who occupied St. Nicholas Cathedral by virtue of the decision and injunction of 1924, the North American church followed Metropolitan Platon. In 1933, the Acting *Locum Tenens*, Sergius, dispatched one Benjamin (Fedchenkoff) to the United States in order to take over the administration of the metropolitan district from Platon, whose proclamation of autonomy was declared to be "null and void". Sergius also purported to excommunicate Platon and all the clergy and laymen who followed him, until they submitted themselves to the jurisdiction of the patriarchal Exarch Benjamin (in America) or directly to the Acting *Locum Tenens* (in Moscow). Finally in 1934, Sergius appointed his ambasador, Benjamin, as "permanent Ruling Bishop of the Russian North American Diocese". The text of the order contains a recital that Benjamin had "organized in New York a Diocesan Council and that our *North American Diocese has begun official existence*". This would appear to be a significant admission that the former North American Diocese, which had by that time become a metropolitan district, had achieved practical administrative autonomy and that it was necessary for the Russian church to organize a new diocese. By 1945, the number of parishes which recognized the new diocese set up by Benjamin in 1934, and which we must assume, in view of the provisions of the Religious Corporations Law since 1875, were organized for the purpose of adhering to such new diocese set up by Benjamin, was only 13, while those adhering to the autonomous metropolitan district were said to total 358.

Platon died in 1934 and another sobor of the American church convened at Cleveland. Bishop Theophilus (Pashkovsky) was elected as ruling bishop and has served as such since. The temporary autonomy of the North Amer-

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coming a slave to the atheistic Russian Government and was aiding it in its fight against all religion. In view of those conditions, the Russian church here felt it had no alternative but to insist upon temporary autonomy envisaged by the ukase No. 362 of 1920.

ican metropolitan district created in 1924 was re-affirmed, and rules for the administration of parishes were adopted. Another sobor at New York in 1937 again confirmed the temporary autonomy of the North American metropolitan district. The central church authorities in Moscow immediately issued a decree suspending and excommunicating Bishop Theophilus.

In 1934, John S. Kedrovsky, the schismatic, also died, but his son, Nicholas, continued to occupy the St. Nicholas Cathedral, even though by that time the "Renovated Church" had ceased to exist. Nicholas remained there until 1944, when he too died, and possession of the cathedral passed informally to his brother, John, who claimed to be a priest by virtue of an ordination of the "Renovated Church".

In 1940, the status of the metropolitanate again came before this court in *Waipá* v. *Kushwara* (259 App. Div. 843, motion for leave to appeal denied 283 N. Y. 780). That was a suit to oust a priest from a Russian Orthodox Church in Yonkers, N. Y. He had been suspended by Archbishop Theophilus of the metropolitan district and in the civil action brought against him, he defended on the ground, among others, that Benjamin, the appointee of the Moscow Patriarchate and not Archbishop Theophilus, the elected metropolitan, had the power and authority to administer the affairs of the church here. The lower courts rejected that contention, finding authority for the creation of the administrative autonomous metropolitan district in the ukase of 1920 of Patriarch Tikhon which was to continue "until such time as the existing civil authorities * * * would cease interfering with the church". (N. Y. L. J., Jan. 6, 1940, p. 97, col. 5.) We denied leave to appeal.

Following the invasion of Russia by Germany in 1941, the Soviet Government, fighting for survival, apparently found it expedient to permit a somewhat broadened area of activity to the Russian Orthodox Church in that country. Then, following the death of Sergius in 1944, it consented to the convening of a sobor at Moscow in January of 1945. The news which was permitted to seep out of Russia after 1941 encouraged the hope in the mem-

bers of the metropolitan district that unity might again be found.[15]

Suddenly, without advance notice, an invitation was received for the North American church to be represented at the new sobor in Moscow. Four delegates were hurriedly chosen—three clergymen and one layman, the attorney for the church—who made preparations to travel to Alaska, from which place the Russian Government was to provide transportation to Moscow. After two of the clergymen had started, the Soviet Government cancelled the visa of the attorney on the pretext that entry was permitted only to clerical persons—a restriction which was not observed with reference to the delegation from Yugoslavia. The two clergymen who had already left were met by a Russian airplane which was to carry them to Moscow. Instead, they were landed in Siberia and transferred to a train to continue their journey. As a result, they arrived in Moscow ten days after the sobor had adjourned.

They found that one Alexy had been named Patriarch of the Russian Orthodox Church, and they presented to him a report of the church in North America and a request for the lifting of the spiritual separation on terms of autonomy. In return, they were handed a prepared document, the so-called ukase of February, 1945, for delivery to Metropolitan Theophilus. The terms of this ukase were not acceptable to the North American church. Instead of the necessary autonomy, the ukase provided for the calling of a sobor in America to be presided over by an archbishop sent from Russia. The sobor was to be required to declare in the same of the church "its abstention from political activities against the U. S. S. R. and give corresponding orders to all parishes". There was no comment or provision concerning the status of Metropolitan Theophilus, the elected head of the North American church. Instead, the sobor was to be required to elect

[15] As stated in an official report of the metropolitan district, "It seemed, in form at least, that the mother church was being restored to a position of dignity and usefulness. * * * The time appeared to be ripe for a discussion of the terms on which the two churches might be reunited."

a new person to be head of a new metropolitan district. Two representatives of the then Moscow Patriarchate were recommended as candidates for the position, and the right was reserved to refuse confirmation of the person chosen "if he be considered unsuitable by the Patriarchy, for any motivated reason whatsoever". There was an intimation that "some extended powers" might be given to the person so chosen and confirmed, "but the right to confirm candidates for bishop, the right to reward the clergy with higher titles, and the right of appeal as regards bishops, clergy and others, remain with the Moscow Patriarchy."

A council of the bishops of the North American metropolitan district met in May, 1945, and decided that the terms proposed in the ukase of February, 1945, were not acceptable.[16]

The attempts at reconciliation having met with failure, the metropolitan district decided to commence this action to recover possession of St. Nicholas Cathedral, which by

[16] In an official report to the clergy and laymen, published in July, there was a full discussion of the background and necessity of the 1924 declaration at Detroit of temporary autonomy for the North American metropolitan district. Reference was made to the recent efforts at unity, the chicanery by which the American delegates were prevented from attending the Moscow sobor, and the substance of the ukase then issued. The report emphasized that the metropolitan district considered itself as part of the Russian church and desired that the suspension be lifted. It was pointed out, however, that the text of the ukase disclosed that the Moscow patriarchate had "little conception of the conditions of church life in this country, and of the atmosphere of religious and political freedom in which the American Church has developed." Then followed a point-by-point analysis of the ukase. One of the major obstacles was the insistence of the patriarchy upon renunciation of political activities against the U. S. S. R. The report said: "It would be inconsistent with the duties and obligations of loyal American and Canadian citizens, and contrary to the traditional atmosphere of freedom of speech and political action in these countries, for the Russian Church in America to give the pledge of loyalty to a foreign power which is implicit in the demand of the Patriarchal Ukase." Another stumbling block was the vagueness of the ukase as to the powers of the North American church. It was felt that "the precise nature of the relationship between the two churches should be defined in advance. This is particularly necessary in view of the precarious situation of the mother church, existing as it does by sufferance of a totalitarian regime."

custom and rule had always been the See of the Russian Orthodox Church in North America and the residence and place of worship of the ruling bishop of the church in North America. Technically, the plaintiff in this action is the corporation, "Saint Nicholas Cathedral of the Russian Orthodox Church of North America". When the land for the proposed cathedral was acquired in 1899, title was taken in the name of a religious corporation organized pursuant to the Religious Corporations Law of 1895 (L. 1895, ch. 723, §50) which provided that the incorporators of such Orthodox churches should be, by virtue of office, the Russian Ambassador and the Consul-General. This corporation, so formed, retained title until 1925, with the exception of one year (1916-17) when title was temporarily placed in the name of the then ruling Archbishop Evdokim to whom John S. Kedrovsky, when he brought his 1918 action, was subject as a priest and whom, he in his complaint, recognized as the true head of the North American Diocese.

In 1925, a special act of the New York State Legislature (L. 1925, ch. 463) created the plaintiff corporation, composed of Metropolitan Platon and others of the metropolitan district, to which the old or 1899 corporation transferred the cathedral property. The deed was signed by the Russian Consul General, but not by the other statutory incorporator, the Russian Ambassador, as we did not then recognize the Russian Government in that country. That necessary defect was cured, and all such deeds validated by a subsequent act of our Legislature. (L. 1942, ch. 206.) Moreover, the corporate existence of the plaintiff corporation was specifically confirmed by still another act of our Legislature (L. 1945, ch. 817), "notwithstanding any non-user by said corporation of its corporate rights, privileges and franchises or the lapse of any period of time during which said corporation was inactive." The plaintiff corporation, accordingly, is the present owner of the record title to St. Nicholas Cathedral. This is not, however, the ordinary ejectment action, in which proof of such title and of an ouster would constitute ground for relief. Since 1875 (L. 1875, ch. 79) our Legislature has provided for the denominational control and administration of church prop-

erties and temporalities. (See Religious Corporations Law, §5.) The corporate owner of the title thus holds the property *in trust* for the religious body for whose use it was dedicated. Plaintiff does not dispute this trust theory, but on the contrary relies upon it. Plaintiff has endeavored to prove that the beneficial use of the property today rightfully belongs to the Russian church in America (Religious Corporations Law, §105) which was forced to declare its administrative autonomy at the Detroit sobor of 1924 in order to preserve and adhere to those principles and practices fundamental to the Russian Orthodox faith, free from the influence of an atheistic and antireligious foreign civil government.

The action, as stated, was commenced against John Kedroff, the second son of John S. Kedrovsky, in April, 1945. Apparently fearful of his anomalous status, as a cleric of a concededly extinct church, (the "Renovated Church"), Kedroff made overtures to Benjamin, the representative of the Moscow Patriarchate, and in October, 1945, was *reordained* by Benjamin and thereupon surrendered the cathedral premises to Benjamin, as head of a new diocese of a different church.

We must remember that Benjamin never possessed or occupied the cathedral until after the commencement of this action on April 9, 1945, against the defendant Kedroff. Benjamin was not originally a party herein because he was not an occupant of the cathedral but was later permitted to intervene. Kedroff, the second son of Kedrovsky, was but a priest of the schismatic "Renovated Church" and thus could not have defended this action as an occupant of the cathedral. He therefore went to Benjamin, recognized him as the "Chief Church Authority", and said "Ordain me all over again" and had himself reordained as a priest by Benjamin in what must have been the latter's new diocese. When Benjamin did so reordain Kedroff as a priest, the latter "gave" the cathedral to Bejamin according to Benjamin's counsel here. Thereafter, in order to obtain an adjournment in this action, Benjamin stipulated to and did give up possession of the cathedral on June 6, 1947. At the time of the trial, when he was called

by the plaintiff *only*, Benjamin was living at 38 Halsey Street in Brooklyn. Benjamin was therefore an occupant of the cathedral only from October, 1945, a time subsequent to the commencement of this action, until June 6, 1947.

Kedroff had interposed a general denial to plaintiff's complaint. After Benjamin, following such surrender by John Kedroff, took over the cathedral, he was permitted to intervene and interposed the present amended answer setting up four affirmative defenses. Only the first need concern us here. The second, third and fourth defenses, i.e., nonuser and lack of authority in plaintiff, the Statute of Limitations and laches, respectively, were either ignored, abandoned or found in plaintiff's favor below. There was little or no discussion concerning them and they have been effectively eliminated from the case. The first affirmative defense sets up Benjamin's appointment and his asserted right to occupy the cathedral by virtue of such appointment to that office.

Before this action was commenced a new article of the Religious Corporations Law, 5-C, was passed by both houses of the New York Legislature. It was subsequently signed by the Governor. This legislation had a conclusive effect upon the issues presented in the case at bar and will be discussed at length below. Quite apart from this legislative action with respect to the specific dispute here involved, we think that, as a matter of common law as intimated by our 1928 decision in *Kedrovsky* v. *Russian Catholic Church* (249 N. Y. 75, *supra*), there was ample basis and room for an exercise of the discretionary power of the Supreme Court over the conduct of trustees, in favor of the North American metropolitan district. We think that in the light of historical facts and the evidence in the records before us, the conclusion would have been fully warranted that the leaders of the North American metropolitan district are the trustees "who may be relied upon to carry out more effectively and faithfully the purposes of this religious trust" (pp. 77-78), i.e., who may administer the temporalities of St. Nicholas Cathedral for the benefit of the faithful for whose use it was originally dedicated.

The courts below, in granting judgment herein to de-

fendants, did not determine, in the exercise of their discretion, whether defendants could be relied upon to carry out faithfully and effectively the purposes of the religious trust. The *Westminster* and *Watson* cases (*supra*), were cited and the conclusion drawn that St. Nicholas Cathedral must be occupied by an archbishop appointed by the central authorities in Moscow and that Benjamin, who was so appointed, was therefore, entitled to the possession of the cathedral. This, we think, was error. The determinative issue in the case, apart from the action of the Legislature with respect to the problem, was whether there exists in Moscow at the present time a true central organization of the Russian Orthodox Church capable of functioning as the head of a free international religious body. If the Moscow patriarchal throne has been resurrected by the Soviet Government solely as a means of influencing opinion at home and abroad, and if it may now operate on an international scale, not as a true religious body, but only as an extension or implementation of Russian foreign policy, then it is clear that the North American metropolitan district and not the appointee or ambassador of the central authorities in Moscow, is the proper trustee to manage for the benefit of the faithful in this hemisphere those religious temporalities dedicated to the use of the Russian Orthodox mission and diocese prior to 1924 when it became an administratively autonomous metropolitan district. (Religious Corporations Law, §105.)

We know that a nominal church organization exists in Russia, but that is not enough. We are told—by the *only* witness called by the defendants and one who supplied the *only* testimony to this effect—that "from 1925 to date, the church has received greater liberty and is functioning freely as an orthodox church, without interference by the civil authorities, and the political views held by the authorities, *and any atheistic sentiment that they may have in no way interferes* with the unhampered activities of the Russian Orthodox Church." On the other hand, plaintiff urges that, willingly or not, the Moscow patriarchy is unable to conduct "church-administrative activity" except as an arm of the Russian Government to further its domestic and foreign

policy; that that is a fact publicly recognized by our President and our State Department; and that it is attested to and demonstrated in the records submitted to us by (1) the imprisonment of Patriarch Tikhon, (2) the suppression of the patriarchal church during the days of the State-supported schism of the "Renovated Church" and (3) by the later re-establishment of an enfeebled patriarchate, when the "Renovated Church" had served its purpose, willing to pledge its loyalty to the Russian State and to attempt to exact a similar pledge from clergy abroad. Having in mind the warning of Lord COLERIDGE, in *Lumley* v. *Gye* (2 El. & Bl. 216, 267), "Judges are not necessarily to be ignorant in Court of what everybody else, and they themselves out of court, are familiar with", we feel we must accept the historical statements contained in the dissenting opinion of Mr. Justice VAN VOORHIS, below: "* * * In recent public pronouncements the State Department, and our representatives in the United Nations, have frequently recognized and denounced the suppression of human rights and basic liberties in religion as well as in other aspects of life, existing in Soviet Russia and in all of its satellite states. The President of the United States has publicly characterized such efforts as a campaign to turn religion into a tool of the state (Armistice Day Address, November 11, 1949)." (276 App. Div. 309, 330.)

Everyone agrees that the Russian Orthodox Church has continuously existed down through the centuries, for no communicant would concede that the suppression of the church by the Soviet Government had ever destroyed the patriarchy as a *spiritual symbol* of the spiritual unity of the Church as distinguished from its temporalities. Moreover, members of the North American metropolitan district admittedly revere and respect the *office* of the patriarchy, whatever may be their feelings as to the merits of the current incumbent of the office. This devotion is traditional and serves as a common bond for the members of the *Russian* Orthodox Church, as distinguished from the members of other Orthodox churches in various countries which have recognized as their spiritual heads at various times the Patriarchates of Constantinople, of Alexandria, of Antioch,

of Serbia and of Jerusalem. Recognition of the Moscow patriarchy by the North American metropolitan district in that sense is by no means a disavowal of the position steadfastly maintained by it down to the present day, viz., that the beloved patriarchy has been absorbed by the Russian Government and its action deprived, during the period of such domination, of any religious significance.

In short, we think that further inquiry might well have been made into the present status of the patriarchate in Russia and we think the Supreme Court should have determined, in the exercise of its discretion, whether Benjamin, the appointee of the central church authorities in Moscow, or Metropolitan Theophilus, the archbishop of the North American metropolitan district, was the proper person to administer the temporalities of St. Nicholas Cathedral and whether he was the proper trustee "who may be relied upon to carry out more effectively and faithfully the purposes of this religious trust (*Carrier* v. *Carrier*, 226 N. Y. 114)." (*Kedrovsky* v. *Russian Catholic Church*, 249 N. Y. 75, 77-78, *supra*.) That was not done because it was thought that the cases of *Watson* v. *Jones* (13 Wall. [U. S.] 679, *supra*), and *Trustees of Presbytery of N. Y.* v. *Westminster Presbyt. Church* (222 N. Y. 305, *supra*), required a decision in favor of defendants and that the earlier case of *Kedrovsky* v. *Rojdesvensky* (242 N. Y. 547, *supra*), was determinative of some phases of the problem. Our views on this aspect of the controversy would require reversal and the ordering of a new trial so that the Supreme Court might exercise its discretion along the lines herein indicated. It is unnecessary, however, to discuss that further, for there is another ground requiring reversal here and judgment in favor of the plaintiff and the North American metropolitan district which it represents.

We refer, of course, to the authoritative and unambiguous action finally taken by the New York State Legislature in 1945 and 1948 with respect to the controversy which has now occupied the attention of our courts for a quarter of a century.

If there were any doubt as to the proper determination of the case along common-law lines, it has been completely

eliminated by the Legislature. In April of 1945 (L. 1945, ch. 693), the Governor signed a bill adding a new article 5-C to the Religious Corporations Law consisting of four sections, two of which, sections 105 and 107, are presently material. In 1948 (L. 1948, ch. 711) important amendments were made to these sections which will be noted later. In the first section (§ 105), the Legislature defined the "Russian Church in America" (i. e., the North American church as we have referred to it above) and carefully traced its origin. The first paragraph of the section 105, as it reads today, is as follows: "The '*Russian Church in America*', as that term is used anywhere in this article, *refers to that group of churches, cathedrals,* chapels, congregations, societies, parishes, committees and other religious organizations of the Eastern Confession (Eastern Orthodox or Greek Catholic Church) *which were known as* (a) Russian American Mission of the Russian Orthodox Church from in or about 1793 to in or about 1870; (b) Diocese of Alaska and the Aleutian Islands of the Russian Orthodox Church from in or about 1870 to in or about 1904; (c) Diocese of North America and the Aleutian Islands (or Alaska) of the Russian Orthodox Church from in or about 1904 to in or about 1924; and (d) Russian Orthodox Greek Catholic Church of North America since in or about 1924; *and were subject* to the administrative jurisdiction of the Most Sacred Governing Synod *in Moscow* until in or about 1917, later the Patriarchate of Moscow, *but now constitute an administratively autonomous metropolitan district* created pursuant to resolutions adopted at a general convention (sobor) of said district held at Detroit, Michigan, on or about or between April 2nd to 4th, 1924". (Emphasis supplied.)

The second paragraph of section 105, defines what is meant in the statute by the phrase "Russian Orthodox church." This is used as a word of art and is used generally to denote the particular local buildings or organizations of the Russian Orthodox faith as distinguished from the spiritual church. The statutory definition reads as follows: "A 'Russian Orthodox church', as that term is used anywhere in this article, is a church, cathedral, chapel,

congregation, society, parish, committee or other religious organization founded and established for the purpose and with the intent of adhering to, and being subject to the administrative jurisdiction of said mission [a above], diocese [b and c above], or autonomous metropolitan district [d above] hereinabove defined as the Russian Church in America." It is to be noted that the words "Russian Orthodox church" refer not only to those church buildings and religious organizations founded and established for the purpose and with the intent of adhering to, and being subject to the autonomous North American metropolitan district *since 1924*, but also to those properties and organizations adhering and subject in the past to the Russian Mission from 1793 to 1870, and the North American Dioceses from 1870 to 1904 and from 1904 to 1924.

These definitions, in turn, make the meaning and intent of section 107 clear. With them in mind, the following command of the Legislature in section 107 is abundantly plain:

"1. *Every Russian Orthodox church in this state, whether incorporated before or after the creation of said autonomous metropolitan district*, and whether incorporated or reincorporated pursuant to this article *or any other article of the religious corporations law*, or any general or private law, *shall recognize and be and remain subject to the jurisdiction and authority* of the general convention (sobor), metropolitan archbishop or other primate or hierarch, the council of bishops, the metropolitan council and other governing bodies and authorities *of the Russian Church in America*, pursuant to the statutes for the government thereof adopted at a general convention (sobor) held in the city of New York on or about or between October 5th and 8th, 1937, and any amendments thereto and any other statutes or rules, heretofore or hereafter adopted by a general convention (sobor) of the Russian Church in America *and shall in all other respects conform to, maintain and follow the faith*, doctrine, ritual, communion, discipline, canon law, traditions and *usages of the Eastern Confession* (Eastern Orthodox ~~or~~ Greek Catholic Church).

"2. * * * *

"3. *The trustees of every Russian Orthodox church shall have the custody and control of all temporalities and property,* real and personal, belonging to such church and of the revenues therefrom *and shall administer the same in accordance with the by-laws* of such church, the normal statutes for parishes of the *Russian Church in America* approved at a general convention (sobor) thereof held at Cleveland, Ohio, on or about or between November 20th, to 23d, 1934, and any amendments thereto and all other rules, statutes, regulations and usages of the Russian Church in America." (Emphasis supplied.) Little, if anything, is left for the courts to construe in the face of such a clear manifestation of intent. St. Nicholas Cathedral, the subject property herein, is indisputably a "Russian Orthodox church", as defined in the statute. It was built in 1903 and dedicated as a cathedral in 1905, in connection with the establishment of the Diocese of North America and the Aleutian Islands, which as we have seen, is listed in the first paragraph of section 105. It is a "cathedral * * * founded and established for the purpose and with the intent of adhering to and being subject to the administrative jurisdiction of said mission, *diocese,* or autonomous metropolitan district hereinabove defined as the Russian Church in America". (Emphasis supplied.) As such, it is within the purview of subdivision 1 of section 107 and must be subject to the jurisdiction and authority of the governing bodies of the North American church. Likewise, pursuant to subdivision 3 of section 107, the trustees of the St. Nicholas Cathedral corporation must administer the cathedral in accordance with the by-laws, the normal statutes for parishes of the Russian Church in America as therein defined.

Special Term attempted to construe the statute, as it stood in 1945, in such a manner as to make it applicable *only* to those *new* parishes, founded and established *after 1924* for the express purpose of adhering to the Russian Church in America. Whether the court's construction was justified under the then wording of the statute is not before us, for after the decision at Special Term, and obviously

as a result of it, the Legislature amended the statute to read in its present form, above quoted. In order that there might not be any doubt that the 1945 legislation was intended to apply to a property, such as St. Nicholas Cathedral, the second paragraph of section 105, defining "Russian Orthodox Church", was amended so that there was included within its compass any cathedral "founded and established for the purpose and with the intent of adhering to, and being subject to the *administrative* jurisdiction of said *mission, diocese or autonomous metropolitan district hereinabove defined* as the Russian Church in America." (New matter italics.) Likewise, subdivision 1 of section 107, which provides that every such Russian Orthodox church in this State shall "recognize and be and remain subject to the jurisdiction and authority" of the Russian Church in America, was amended to provide that such Russian Orthodox churches were within its coverage "whether incorporated *before or after the creation* [1924] *of said autonomous metropolitan district.*" (New matter italics.) These significant amendments, enacted within a month after Special Term's decision, illustrate beyond cavil that the decision of that court did not correspond with the intent of the Legislature, which immediately interpreted and explained its prior enactment.

Nevertheless, the majority in the Appellate Division, while conceding that plaintiff was entitled to the benefit of the statute in its amended form, failed to properly appreciate and give meaning to what we consider to be the plain legislative intent. It said in part (p. 317): "In other words, it appears to us that it [§ 107] was intended to mean that any church *heretofore or hereafter* incorporated for the purpose of adhering to the American Church must be subordinate to the rules and the decisions of the authorities of the governing bodies of that church [the American church, the autonomous metropolitan district, created in 1924]." Such a view gives no meaning to the change made by subdivision 1 of section 107, by the 1948 amendment. That amendment excised the three words ("heretofore or hereafter") which we have italicized in the above quotation, and substituted the words: "before or after the creation of

said autonomous metropolitan district, [in 1924] * * *." The following quotation from subdivision 1 of section 107 shows in brackets the words eliminated by the 1948 amendment and indicates by italicizing the words substituted by that amendment: "Every Russian Orthodox Church in this State, whether [heretofore or hereafter] incorporated *before or after the creation of said autonomous metropolitan district,* * * * shall recognize and be and remain subject to the jurisdiction and authority of * * * the Russian Church in America, * * *." The Legislature quite clearly made the amendment after the decision at Special Term herein so as to remove the possibility of a construction such as that adopted by the Special Term and later the Appellate Division, that the statute was limited in its operation to churches incorporated after 1924. If, as the Appellate Division construed it, the statute were limited to churches "incorporated for the purpose of adhering to the American Church", that would mean that it could only apply to churches founded and established after 1924, since that was the year in which the autonomous metropolitan district, denominated by the Appellate Division, the American church, was created. Yet subdivision 1 of section 107 clearly states that it is to apply to Russian Orthodox churches "whether incorporated *before or after* the creation of said autonomous metropolitan district," i. e., before or after 1924. The only construction which gives meaning to all the language in sections 105 and 107 is that the statute was intended to apply to those Russian Orthodox churches founded and established before 1924 for the purpose of adhering and being subject to the North American Mission or North American Diocese, and to those Russian Orthodox churches founded and established after 1924 for the purpose of adhering and being subject to the autonomous metropolitan district. The majority in the Appellate Division further intimated that to read the statute literally would result in an interference in ecclesiastical concerns not within the competency of the Legislature. The latter suggestion is the only one which requires discussion, for, as already indicated, the intent of the Legislature (as distinguished from its competency) is unmistakable.

The primary purpose of the Religious Corporations Law is to provide for an orderly method for the administration of the property and temporalities dedicated to the use of religious groups and to preserve them from exploitation by those who might divert them from the true beneficiaries of the trust. Prior to 1875, when the Legislature provided for denominational control of the temporalities of religious corporations, the majority of the members of a religious corporation could change its denominational character and devote the church property to an entirely different religious faith than that for which it was originally dedicated. (*Robertson* v. *Bullions*, 11 N. Y. 243, 263-264; *Petty* v. *Tooker*, 21 N. Y. 267; *Gram* v. *Evangelical Lutheran Soc.*, 36 N. Y. 160). For the public good, the Legislature decreed that the trustees of religious corporations, irrespective of the wishes of the majority of the local congregation, must administer the temporalities in accordance with the discipline, rules and usages of the ecclesiastical body, if any, to which the corporation was subject. (Religious Corporations Law, §5.) As a broad guide this rule undoubtedly has worked well, but it is by no means a constitutional doctrine not subject to change or modification by the same Legislature which announced it, in cases where literal enforcement would be unreasonable and opposed to the public interest. The Legislature, in the exercise of its extensive and acknowledged power to act for the common welfare, may find as a fact that a situation has arisen of such novelty and uniqueness that existing law is incapable of performing its avowed function—the preservation of religious temporalities for the use of their original and accustomed beneficiaries. If the Legislature find as a fact that, because of drastically changed circumstances, the accustomed beneficiaries of religious properties are thus threatened with their loss, and if there be a basis for such finding, we perceive no constitutional objection to a legislative attempt to trace and identify, as of today, the authentic group entitled to the administration of such properties.

That, as we see it, is all that the Legislature has done in the above-quoted provisions of article 5-C. The Legisla-

ture has made a determination that the "Russian Church in America" was the one which, to use our words in 249 New York at pages 77, 78, was the trustee which "may be relied upon to carry out more effectively and faithfully the purposes of this religious trust (*Carrier* v. *Carrier*, 226 N. Y. 114)" by reason of the changed situation of the patriarchate in Russia. No purpose would be served by repeating all the circumstances which forced the North American church to declare its temporary autonomy, and the process by which the Moscow Patriarchy has been subjugated by the Russian Government and used as its tool. All that has been detailed fully above. These facts must be deemed to have been found by and to have been within the actual knowledge of the Legislature when it decided to act in 1945 and 1948. Even assuming that we, as judges, are prevented from recognizing these facts, it cannot be successfully contended that the Legislature is required to labor under such unrealistic handicap.

The Legislature of the State of New York, like the Congress of the United States, in addition to the general knowledge of its members, has access to vast sources of information to assist in determining the need and scope of new statutory law. Every new piece of legislation is the result of certain factual premises, whether they be expressed or tacit. In gathering the material for these premises, and in evaluating conflicting data, the Legislature is not bound by any formal rules. It has the widest latitude of inquiry. It cannot, and does not, close its eyes to any legitimate avenue of knowledge.

The courts have always recognized that it is the province of the Legislature to make the underlying findings of fact which give meaning and substance to its ultimate directives. The courts have traditionally refused to consider the wisdom of technical validity of such findings of fact, if there be some reasonable basis upon which they may rest.

Thus, in passing upon matters of legislative intent and competence, the courts do not merely read the bare end product of the legislative labors. They read the statute in the light of the state of facts which were found by the Legislature, and which prompted the enactment. Then, and

only then, can the courts intelligently approach their assigned tasks.

A recent pertinent example of such judicial recognition of the extent of the power of the legislative body to find the facts in a situation involving communist activity is found in *American Communications Assn.* v. *Douds* (339 U. S. 382). There, the noncommunist oath provision in the National Labor Relations Act was upheld, not because any such oath requirement was generally within the power of Congress, but because the specific evil, *the existence of which Congress was assumed to have reasonably found as a fact,* was such that some infringement upon traditional liberties was justifiable. The case illustrates well that enactments which might seem unconstitutional on their face may yet be sustained if the factual background found by the legislative body warranted an extended exercise of its powers. The case is noteworthy, too, in that it rejects the fallacious contention that the legislative body cannot go behind a carefully constructed facade to ascertain the real motives, ends and techniques of communist activity. It recognizes, as we must recognize in the instant case, that problems created by the extension of Soviet communist activity in this country are *suigeneris,* and can only be dealt with intelligently on that basis.

As Justice JACKSON said in his opinion (p. 423, fn. 1): "Of course, it is not for any member of this Court to express or to act upon any opinion he may have as to the wisdom, effectiveness or need for this legislation. 'Our inquiries, where the legislative judgment is drawn in question, must be restricted to the issue *whether any state of facts either known or which could reasonably be assumed affords support for it.' United States* v. *Carolene Products Co.* 304 U. S. 144, 154." (Emphasis supplied.) (See, also, *Powell* v. *Pennsylvania,* 127 U. S. 678, 685; *O'Gorman & Young* v. *Hartford Fire Ins. Co.,* 282 U. S. 251, 257-258; *Szold* v. *Outlet Embroidery Supply Co.,* 274 N. Y. 271, 278.)

The judicial technique of ascertaining the legislative finding of fact supporting a particular enactment is shown in Justice JACKSON's opinion in the *Douds* case (*supra,* pp. 424-433). He wrote (p. 424):

"From information before its several Committees and from facts of general knowledge, Congress could rationally conclude that, behind its political party facade, the Communist Party is a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system. A rough and compressed grouping of this data would permit Congress to draw these important conclusions as to its distinguishing characteristics." (Then follows a footnote containing a long list of books and articles.) * * *

"It rejects the entire religious and cultural heritage of Western civilization, as well as the American economic and political systems. This Communist movement is a belated counter-revolution to the American Revolution, designed to undo the Declaration of Independence, the Constitution, and our Bill of Rights * * *" (p. 425).

The Legislature of the State of New York, like the Congress, must be deemed to have investigated the whole problem carefully before it acted. The Legislature knew that the central authorities of the Russian Orthodox Church in Russia had been suppressed after the 1917 revolution, and that the patriarchate was later resurrected by the Russian Government. The Legislature, like Congress, knew the character and method of operation of international communism and the Soviet attitude toward things religious. The Legislature was aware of the contemporary views of qualified observers who have visited Russia and who have had an opportunity to observe the present status of the patriarchate in the Soviet system.[17] The Legislature realized that the North American church, in order to be free of Soviet interference in its affairs, had declared its tem-

[17] Our former Ambassador to Russia wrote: "The new tolerance for the Orthodox Church can be seen, therefore, as severely limited and primarily designed to serve as an instrumentality of an expansive foreign policy." (Walter Bedell Smith, My Three Years in Moscow, p. 268.) See, also, Anne O'Hare McCormick in the *New York Times*, April 8, 1950: "The church has again an official place in the Soviet Union, but as an agency of the state; on the same terms the religious leaders being imprisoned and executed as 'traitors' in the countries under Soviet control would be tolerated. When Caesar is also God there can be no divided tribute."

porary administrative autonomy in 1924, pursuant to the ukase of 1920, while retaining full *spiritual* communion with the patriarchate, and that there was a real danger that those properties and temporalities long enjoyed and used by the Russian Orthodox Church worshippers in this State would be taken from them by the representatives of the patriarchate. On the basis of these facts, and the facts stated (*supra*) and no doubt other facts we know not of, our Legislature concluded that the Moscow Patriarchate was no longer capable of functioning as a true religious body, but had become a tool of the Soviet Government primarily designed to implement its foreign policy. Whether we, as judges, would have reached the same conclusion is immaterial. It is sufficient that the Legislature reached it, after full consideration of all the facts.

It is clear, therefore, that the plaintiff corporation and the autonomous metropolitan district which it represents, must prevail in this action in accordance with the legislative finding and mandate and be reinvested with the possession and administration of the temporalities of St. Nicholas Cathedral.

The judgments below should be reversed, with costs in all courts, and judgment directed for the plaintiff.

Froessel, J. (concurring). As I view this controversy, we have the rather unusual situation of a foreign government, which all of us agree is grossly antireligious, assuming domination and control over the Russian Orthodox Church, leaving that church fettered, helpless and restrained of its freedom. Any other view, it seems to me, is to ignore stark reality. Under that domination, which is nothing less than plain duress, it seeks to reach out to the United States to assume control of church property within this State, title to which is held by plaintiff, a New York State corporation, and which property has been dedicated to the use of members of a parish and of a diocese.

The evidence in the records before us, and as outlined in the prevailing opinion, buttressed by facts of historical knowledge of which we may take judicial notice (*Nankivel v. Omsk All Russian Government*, 237 N. Y. 150, 156), and

as found by the Legislature of this State (*East New York Sav. Bank* v. *Hahn*, 293 N. Y. 622), leads inescapably to the conclusion that plaintiff is entitled to judgment.

Judge CONWAY has sufficiently outlined in detail the history of the Russian Orthodox Church, so far as pertinent here. We are all in accord that the election of Patriarch Tikhon at the sobor of 1917-18, following the Kerensky revolution, had indisputable validity, and that Archbishop Evdokim was the duly appointed diocesan archbishop for North America in 1917, before he returned to Russia. It was he who held title to the property in suit for a short time (1916-17), and then voluntarily reconveyed it to plaintiff's corporate predecessor. After Kerensky was overthrown and the Bolsheviks came into power, the patriarchal chain of succession was broken. The prevailing opinion outlines briefly what happened to the Russian Orthodox Church in Russia. When Patriarch Tikhon, the last duly elected patriarch, was imprisoned, he issued his famous ukase to the Russian Orthodox Church abroad. In 1923, with the concurrence of the Sacred Synod, he designated Platon as ruling bishop of the North American church, who continued until his death in 1934, following his active participation in and approval of the American sobors, commencing in 1922, which invoked the ukase of 1920.

The first sobor of the Russian Orthodox Church held since Tikhon was elected Patriarch was the psuedo-sobor of 1923, at which no Patriarch was elected, and which is now conceded to have been uncanonical. The only other sobor held since was the one at Moscow in 1945, when the American delegates, two clergymen, were met by a Russian airplane, but deposited in Siberia instead of Moscow in the month of January, rendering it impossible for them to complete their journey by train until ten days after the sobor had adjourned, thus denying them representation though duly invited.

We do not have here any such situation as was presented in *Watson* v. *Jones* (13 Wall. [U. S.] 679) where the highest church body was concededly free. Here, the Russian Orthodox Church, as presently constituted and dominated, is

not free, its administrative agency is not the true body of the church, and is compelled to demand loyalty to the Soviet Government from all the priests of the Russian Church abroad.

By our decision, we are not intruding unlawfully into the internal affairs of a religious body, but rather refusing to sanction such intrusion by an atheistic foreign government, so far as it affects property within our jurisdiction. Plaintiff-appellant holds title to the property in suit, in trust, not for the Russian Orthodox Church, but rather for the use of the membership for whom it was dedicated, and, so long as it administers the property for the faithful of the church within the diocese, it is entitled to possession and control. (*Westminster Presbyt. Church* v. *Trustees of Presbytery of N. Y.*, 211 N. Y. 213.) As we there said (pp. 225, 226), where the ecclesiastical governing body's freedom of action was unquestioned, "* * * The error which, as it seems to me, pervades the disposition made of this case in the courts below, is the idea that the Presbytery could take away from the Westminster Presbyterian Church of West Twenty-third Street all authority and control of its trustees over its real property, and by hostile action appropriate that property to such uses as it saw fit without any legal proceeding to that end, and wholly by the exercise of the ecclesiastical jurisdiction of the Presbytery." How much more so does this reasoning apply to the instant situation.

I concur in Judge CONWAY'S opinion.

DESMOND, J. (dissenting). None of us, of course, deny that the present Russian Government is frankly and grossly antireligious and irreligious. But judicial recognition of that well-known fact is of no help in deciding this lawsuit. We are dissenting here because we strongly feel that this decision is an unlawful intrusion into the internal affairs of a religious body, contrary to first principles of American Government, violative of the First Amendment's guaranty of freedom of religions from such governmental interference, and in conflict with the controlling decisional law as set forth in *Watson* v. *Jones* (13 Wall. [U. S.] 679) and *Westminster Presbyt. Church* v. *Trustees of Presbytery of N. Y.* (211 N. Y. 214). For the decision about to be made is

just this: that the judicial and legislative branches of the Government of this State have the power (and that the New York State Legislature has exercised the power) to oust from the archdiocesan cathedral of the Russian Orthodox Church in New York City, a prelate (defendant Benjamin) who has been appointed archbishop of that archdiocese by the Patriarch of Moscow, supreme head of that church. No other decision reaching such a result can be found in the books.

In aid of clarity we set down these indisputable and uncontested propositions:

1. The Russian Orthodox Church is a "general" or centrally-organized church (see *Watson v. Jones, supra*, p. 722), under whose law and discipline the Patriarch of Moscow, as its supreme head, has the power of appointing archbishops.

2. Defendant Benjamin was appointed by the Patriarch as archbishop of the diocese of North America and the Aleutian Islands, and that appointment is now in effect.

3. The Russian Orthodox Cathedral in New York City, is the See church of the archdiocese, and, accordingly, defendant Benjamin, as the duly appointed archbishop is entitled to possess and occupy that cathedral as his See church.

4. Plaintiff-appellant, a New York corporation, holds title to the cathedral property but, under New York law, that title is in trust for the religious purposes of the Russian Orthodox Church, and for no other purpose (*Westminster Presbyt. Church* v. *Trustees of Presbytery of N. Y.*, 211 N. Y. 214, 223, *supra*).

5. Plaintiff, in seeking to exclude defendant Archbishop Benjamin from possession of the cathedral, is acting under the control of, and in the interest of, a dissident or schismatic group of Russian Orthodox Catholic individuals and parishes, which group, formed at Detroit in 1924, refuses to recognize the authority and primacy of the Patriarch of Moscow.

6. Under the law of New York (see Religious Corporations Law, § 5), religious denominations, such as the world-

wide Russian Orthodox Church, have denominational control over their constituent churches, parishes or branches, and the constituents cannot escape such control by secession (*Trustees of Presbytery of N. Y.* v. *Westminster Presbyt. Church*, 222 N. Y. 305, 313).

7. The appointment of Archbishop Benjamin, as an official act of the highest Russian Orthodox Church authority, was a decision on a denominational matter of internal church government, and as such is final and absolutely binding on the civil courts of this State (*Watson* v. *Jones*, 13 Wall. [U. S.] 679, 727, 729, *supra*).

The sum of those plain propositions is this: that Archbishop Benjamin's possession of the cathedral is not subject to control by any civil authority or by any judgment of a civil court, and that no civil court may decree to the independent or nonconformist group (which controls plaintiff corporation), possession of that cathedral, hostile to the authority and action of the mother church (*Watson* v. *Jones*, *supra*, at p. 734).

What bases, then, are announced for the direction by this court that a judgment issue which will remove defendant Benjamin from his cathedral? As we understand it, those asserted grounds are two: first, that the Moscow Patriarchate is not in fact functioning as the true central organization of the Russian church but is a mere agency or instrumentality of the Soviet regime; and, second, that article 5-C of the New York Religious Corporations Law has, by legislative fiat, ousted the patriarchal appointee, and turned the cathedral over to the schismatics. The first of those bases amounts to a new finding by this court, without evidentiary support in this record, and in the face of contrary testimony, and express contrary findings by both courts below. The second basis gives to article 5-C a construction not reasonably supported by its language, or by its history, or by any reasonable or discoverable legislative intent—a construction which, furthermore, makes the statute unconstitutional. We now take up these matters in turn.

The finding, or determination, now being made by the majority of this court as a basis for reversal, is that the presently ruling Patriarch of Moscow is not, and should

not, be treated as, the true central head of the church, but that he is a mere fellow traveler on the communist road, serving not God but the Soviet Caesar. Interestingly enough, plaintiff itself seems not to cast so cold an eye on the Patriarch, since the record abounds with protestations by the "American", or schismatic Orthodox Russians, of their filial loyalty and devotion to the Patriarch, whom they regard as a virtuous and venerable spiritual leader. Aside from that, and confining ourselves within the strict bounds of our own jurisdiction we, the Court of Appeals, have, of course, no power or right to adjudicate that the incumbent is no true Patriarch but a mere usurper or pretender. We dissenters refuse so to do, not from any mere naiveté as to Russia and communism, but as a necessary conclusion from the record in this lawsuit. At the very most, we have here the attempted determination of a fact, vigorously denied by witnesses, and found to the contrary by the courts which have jurisdiction to pass on facts.

It is suggested that common sense, or general knowledge, makes it appropriate for us to take judicial notice that Patriarch Alexy is not acting independently but is obeying commands of his communist masters. Perhaps he is, for all we know, but his motivation is no proper subject of judicial notice. Many years ago our predecessors warned us against taking judicial notice in such uncertain fields (see *Baxter* v. *McDonnell*, 155 N. Y. 83, 93). And, even if we could, somehow or other, get sure knowledge that the Patriarch's appointment of this archbishop was made for the most unholy reasons, or because of the meanest accommodation to brute power, we still could not, as a court, strike down the appointment or refuse to give it credit. The Patriarch, like all men, must account for his stewardship, but not to the New York courts.

The long and the short of it is that this is an ecclesiastical matter, to which, be their answer right or wrong, the ecclesiastic superiors have the final answer. "* * * and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt, which would do anything but improve either religion or good morals" (*Connitt* v. *Reformed Prot-*

estant Dutch Church of New Prospect, 54 N. Y. 531, 562). We are not talking about the powers of courts or of government to keep from our shores persons dangerous to our institutions, be they churchmen or laymen, or to deal with such persons when and if they violate our laws. No one has testified that Archbishop Benjamin is such a subversive, and, if he were, the New York courts would hardly be the place, or an action of ejectment the method, to arrange for his deportation from our shores. The United States Government has never withdrawn recognition of the Russian Orthodox Church and its Patriarch (see *Ponce* v. *Roman Catholic Church*, 210 U. S. 296, 318).

We turn now to the statute which seems to be appellant's chief reliance. Article 5-C of the Religious Corporations Law, consisting of four sections (§§ 105-108), was enacted in 1945 (L. 1945, ch. 693) and amended in 1948 (L. 1948, ch. 711). Its language follows the general pattern of several other articles in the same law. On its face there is no indication that it had any purpose other than that of any other special or general law incorporating a religious society or sect or church, that is, "to give an organization for public worship legal rights, and to impose on its legal obligations as a corporate body * * *" (*Van Buren* v. *Reformed Church of Gansevoort*, 62 Barb. 495, 497; *Petty* v. *Tooker*, 21 N. Y. 267, 271). Incorporation of a church is the method by which the municipal law recognizes a church's present existence. Obviously, such a statute cannot be a device for transferring property from one faction to another, or for subjecting centrally organized churches to the control of seceding groups. Neither of those two general statements will be contradicted, and yet we are told that the passage by the New York Legislature, in 1945, of article 5-C and its amendment in 1948, had the precise and intended effect of freeing the whole Russian Orthodox religious community in America from its traditional submission to its supreme hierarchial head, of outlawing in New York so much of that community as remained submissive to the Patriarch, of putting the whose group and all its properties under the control of the new schismatic "Russian Church of America", and, specifically, of mandating the ouster of the patriarchically ap-

pointed archbishop and the substitution of a rival claimant, not so appointed. We confidently assert that there is nothing in the statute itself to suggest such a legislative coup, that there is much to show that such was not the legislative purpose, and that the statute, if so intended and so construed, is plainly unconstitutional.

The first section (105) in article 5-C is headed "Definitions". It is not in form or meaning a preamble or legislative finding of fact. It defines two terms used elsewhere in the article: "Russian Church in America" and "Russian Orthodox Church". The long, one-sentence definition of the first of those terms says that, as used in the article, it means those churches, cathedrals, parishes, etc., which were known as the Russian American Mission of the Russian Orthodox Church from 1793 to 1870, then known as the Diocese of Alaska, etc., from 1870 to 1904, then as the Diocese of North America and the Aleutian Islands from 1904 to 1924, and which have been known as the Russian Orthodox Greek Church of North America since 1924, and which were subject to the administrative jurisdiction of the Most Sacred Governing Synod in Moscow until 1917, later the "Patriarchate of Moscow", but which, now constitute an administratively autonomous metropolitan district created pursuant to resolutions adopted at a general convention (sobor) of said district held at Detroit, Michigan, on or about or between April second to fourth, nineteen hundred twenty-four". A "Definition" of a term is a precise statement of its meaning. Nothing could be more precise than the statement (above summarized) which the Legislature thus gave us of what the Legislature meant by the use in article 5-C of the term "Russian Church in America". The definition describes, by reciting its history, the particular "group" of churches intended to be affected by the article. So read, the definition cannot possibly mean anything but this: that the "group" of churches or parishes thus recognized by the Legislature under the name "Russian Church in America", were those particular churches and parishes which were formerly part of the unified body called at successive times first the "Russian American Mission", then called the "Diocese of Alaska and the Aleutian Islands", then styled the "Diocese of North America and the Aleutian Islands",

and which have been called the "Russian Orthodox Greek Catholic Church of North America" since 1924—in other words, the secessionists. To make that totally clear, the Legislature added to its "definition" a statement that it meant those churches, cathedrals or parishes which, though formerly subject to the Moscow Patriarch, had created themselves into an autonomous metropolitan district (or diocese) in April, 1924. On the trial, the witnesses agreed that not all the American parishes of the Russian Orthodox Church have gone over to the new "American" church. The definition describes those who did so cross over. The second "definition" in section 105 (of "Russian Orthodox Church") says that term means a church, cathedral, etc., founded and established with the purpose and intent of adhering to the new metropolitan district.

The next section (106) or article 5-C sets forth the formalities for incorporation of a "Russian Orthodox Church", as defined in section 105. Section 107, as amended in 1948, prescribes the method of government, by the new "Russian Church in America" of "every Russian Orthodox Church in this state", whether incorporated before or after the creation of the new "autonomous metropolitan district". Appellant seizes upon the words "every Russian Orthodox Church in this state" as meaning, literally, every Russian Orthodox parish, church or cathedral, whether or not it has seceded, and whether or not it desires to retain its traditional ties with the Patriarch. Of course, the words must be limited as defined in section 105, which says precisely what they are to mean, when "used anywhere in this article".

Section 108, headed "reincorporation of existing corporations" authorizes the reincorporation "under the provisions of this article", of any "heretofore incorporated Russian Orthodox Church". Such a provision would be useless and meaningless if the Legislature had, by the previous sections of the article, put every Russian Orthodox church and parish, automatically, into the new, dissident, "Russian Church in America". Indeed, if so strange and ruthless a plan had been intended by the Legislature, section 105 itself ("Definitions") would have been meaningless and

unnecessary since, with all included, there would be no need for any definition or limitation.

Article 5-C, we think, is so plain and clear as not to need or permit any construction beyond the patent meaning of its simple words (*Matter of Rathscheck*, 300 N. Y. 346, 350). But if construction were permissible, every known canon of construction would lead to the same result: that the Legislature could not have intended this as a statute of outlawry, ouster, or disestablishment. Words in a statute are to receive their natural and obvious meaning; the general purpose and spirit of the law is to be kept in mind; objectionable consequences, injustice and unreasonableness are to be avoided; acts will not be so construed as to accuse the Legislature of a purpose to do harm (see McKinney's Cons. Laws of N. Y. Book 1, Statutes [1942 ed.], §§ 94, 96, 141, 143, 146, 148, 151, and cases cited for these propositions). A bad result suggests a wrong construction (*People ex rel. Beaman* v. *Feitner*, 168 N. Y. 360, 366). We find another aid to construction in the very practical idea that the busy New York Legislature which enacted over 1,200 laws in 1945, and which had no committee reports or debates as to article 5-C, was entitled to believe that this law meant what it said, without hidden purposes.

And one of the most urgent of all the canons of construction is this one: that a statute must be construed, when possible, "in manner which would remove doubt of its constitutionality, and possible danger that it might be used to restrain or burden freedom of worship or freedom of speech and press" (*People* v. *Barber*, 289 N. Y. 378, 385). Put another way, the rule is that the construction, if at all possible, must be such as not only to avoid unconstitutionality but to avoid grave doubts thereof (*Matter of Cooper*, 22 N. Y. 67, 87, 88; *Kovacs* v. *Cooper*, 336 U. S. 77, 85; *Tauza* v. *Susquehanna Coal Co.*, 220 N. Y. 259, 267; *People* v. *Realmato*, 294 N. Y. 45, 50; *United States* v. *Jim Fuey Moy*, 241 U. S. 394, 401). How can there be any dispute but that this article 5-C, if read so as to take this archbishopric from the control of the central church and give it to appellant's group, is unconstitutional? *Watson* v. *Jones* (*supra*), does not use the precise word "unconstitutional" but the opinion, con-

trasting American with old world systems (see p. 728 *et seq.* of 13 Wall [U. S.], says that "in this country the full and free right to entertain any religious belief, to practice any religious principle" finds expression in the American rule of law that the determinations of the tribunals and judicatories of a centrally-organized church are absolutely binding on the civil power. The modern Supreme Court in *Everson* v. *Board of Educa.* (330 U. S. 1, 13), has cited *Watson* v. *Jones* (*supra*), as authority for the proposition that the First Amendment provides "protection against governmental intrusion on religious liberty" through statutes. It is no answer to this charge of unconstitutionality that there is here in dispute a "property right" only as to the use of a building. "* * * when rights of property are dependent upon the questions of doctrine, discipline or church government, the civil court will treat the determination made by the highest tribunal within the church as controlling" (*Baxter* v. *McDonnell*, supra, 155 N. Y., 83, 101, citing *Watson* v. *Jones, supra;* and *Connitt* v. *Reformed Protestant Dutch Church of New Prospect, supra;* see *Gonzales* v. *Archbishop of Manila*, 280 U. S. 1, 16).

We pause to remark on the notable similarity between the present case and *Watson* v. *Jones* (*supra*). A controversy over slavery split the Presbyterian Church in Kentucky in the 1860s; dissension over communistic ideologies and Soviet controls played their part in the internecine warfare which broke out among the American members of the Russian Orthodox Church. A faction withdrew from the central control in the Presbyterian Church; plaintiff's faction here divorced themselves from their supreme hierarch. In *Watson* v. *Jones*, the Supreme Court, holding the Presbyterian controversy to be "a case of division or schism in the church" (p. 717), as is surely true of our case, made the classic statement of law which runs from page 722 to the end of the long opinion. The holding as between the dissenters and the central organization was summarized thus: "They [the schismatics] now deny its authority, denounce its action, and refuse to abide by its judgments. They have first erected themselves into a new organization, and have since joined themselves to another totally different,

if not hostile, to the one to which they belonged when the difficulty first began. Under any of the decisions which we have examined, the appellants, in their present position, have no right to the property, or the use of it, which is the subject of this suit" (p. 734).

Going back to the statute (art. 5-C) and its supposed effect here, we have, fortunately, the strongest kind of proof from the Religious Corporations Law itself that the Legislature never intended for article 5-C the meaning and result now ascribed to it. In 1943 (ch. 145 of that year) the Legislature, two years before it set up article 5-C, had enacted a new article XV of the Religious Corporations Law and had, concurrently, amended subdivision 3 of section 15 of the Religious Corporations Law. That 1943 legislation described and recognized a "Federation" of the "Four Primary Orthodox Greek Catholic Jurisdictions in America", being the churches, congregations, etc., recognized by the "apostolic historic Orthodox Patriarchates of Constantinople, Antioch, Moscow and Serbia (Jugoslavia)". Among other things, that 1943 law described the processes whereby new congregations adhering to the four historic patriarchates could be newly incorporated or reincorporated as member churches of the federation. The significance for us is this: as late as 1943, the Legislature was thus legislating as to those churches which were under the government of the Moscow Patriarch. The Governor of New York, after signing the bill, made it clear that he so understood its import. In a speech at Buffalo (see Public Papers of the Governor, 1943, p. 550) Governor Dewey said: "For more than one hundred and eighty years members of the Greek Church have been on what is now American soil. We find in the records that as long ago as 1763 a native of the Aleutian Islands was converted by a devout and hardy missionary from Russia. Nineteen years later the Holy Synod sent a mission of eight monks to Alaska and in 1794 they established missionary headquarters on the Kodiak Island. Three years later the hierarchy of the Greek Church consecrated a Bishop of Alaska, but he perished at sea before he could ever reach his diocese. The living successor of the reverend prelates who succeeded

him is The Most Reverend Metropolitan Benjamin of New York. It is an interesting historic fact, particularly in these days, that his full title is Metropolitan of the Archdiocese of the Aleutian Islands and North America."

The Most Reverend Metropolitan Benjamin whom the Governor thus saluted as the successor to the historic line of Orthodox prelates in America was our defendant Benjamin.

Thus we see that in 1943, by article XV and the amendment to section 15, the Legislature dealt with those Orthodox churches which remained loyal to the Patriarch and in 1945 and 1948, through article 5-C, gave its attention and recognition to the new, nonconformist "American Church". There is no slightest sign that the Legislature intended the later statutes to repeal the earlier. We should not strain to discover a repeal by implication but must read these statutes as harmonious parts of a whole and assume that the Legislature in 1945 knew what it had done in 1943 (*Matter of Cooper, supra*, 22 N. Y. 67, 88; *Chase* v. *Lord*, 77 N. Y. 1, 18; *Matter of Tiffany*, 179 N. Y. 455, 457; *Matter of Timmis*, 200 N. Y. 177, 181; *Betz* v. *Horr*, 276 N. Y. 83, 88; *Morris Plan Ind. Bank of N. Y.* v. *Gunning*, 295 N. Y. 324, 331). "The intent and purpose of the legislative commands must be found from the statutes relating to the same general subject-matter taken as a whole" (*Betz* v. *Horr*, *supra*, p. 88). "If by any fair construction, whether strict or liberal, a reasonable field of operation can be found for both acts, that construction should be adopted. In other words, if the old and the new law, by any reasonable interpretation, can stand together, there is no repeal by implication" (*Matter of Tiffany, supra*, p. 457). The Legislature in 1943 dealth with the patriarchal church, in 1945 with the American church, and there is no repugnance, inconsistency, or over-lapping of the two sets of statutes.

A final comment:

In the long run, communist repression and abuse of religion will make religion stronger, for "the blood of the martyrs is the seed of the Church". And so with government interferences with churches in our country. But with us the loser will be a traditional principle of American

Government: that the inner affairs of religious bodies are no concern of the state.

Lewis and Dye, JJ., concur with Conway, J.; Froessel, J., concurs in separate opinion in which Lewis, Conway and Dye, JJ., concur; Desmond, J., dissents in opinion in which Loughran, Ch. J., and Fuld, J., concur.

Judgments reversed, etc.

The judgments should be affirmed, with costs.

Lewis, Dye and Froessel, JJ., concur in opinion by Conway, J.; Lewis, Conway and Dye, JJ., concur in separate opinion by Froessel, J.; Desmond, J., dissents in opinion in which Loughran, Ch. J., and Fuld, J., concur.

Judgment reversed, etc.

EXHIBIT C

Opinion of Callahan, J. Supreme Court, Appellate Division—First Department. June 1949. Edward S. Dore, J. P., Albert Cohn, Joseph M. Callahan, John Van Voorhis, Bernard L. Shientag, JJ. Saint Nicholas Cathedral of the Russian Orthodox Church of North America, Appellant *v.* John Kedroff and Benjamin Fedchenkoff, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church, Respondents. 2423.

Appeal by plaintiff from a judgment entered in the Supreme Court, New York County, dismissing the complaint on the merits after a non-jury trial.

Ralph Montgomery Arkush for appellant.

Philip Adler for respondents.

Callahan, J.: This action in ejectment involves a dispute over the right to possess and use certain church property known as Saint Nicholas Cathedral of the Russian Orthodox Church located on East 97th Street in the City of New York. The dispute has its origin in a break or schism within that church following the Bolshevik revolution in 1918.

Prior to that time the Russian Orthodox Church was a world-wide religious denomination which had existed for 900 years with its headquarters in Russia. It has also variously been known as the Christian Orthodox Catholic Church of the Eastern Confession and the Christian Orthodox Greek Catholic Church.

The adherents of this faith spread to the United States about a century ago and eventually parishes were established in the city of New York.

In 1903 the Saint Nicholas Cathedral was erected with money furnished by the central church authorities in Russia. It was to be used as the episcopal see of the diocese of North America. Title to the property was taken by Russian Orthodox Saint Nicholas Church in New York, a corporation organized under the Religious Corporations Law. Under its charter this corporation was to be controlled by two trustees who were to be the Russian Ambassador and the Russian Consul General to the United States.

The Russian Orthodox Church was a centrally organized one and the archbishops or metropolitans who occupied the cathedral prior to 1918 were appointed pursuant to canon law by the controlling church authorities in Moscow and were answerable only to such authorities.

Historically the head of the Russian Orthodox Church was the Patriarch but from the time of Peter the Great to the Kerensky rebellion the czars had forbidden the calling of any "Sobor" which was the traditional convention of church delegates authorized to elect a patriarch. As a result during this long period no patriarch had held office and the church was governed by the Holy Synod a member of which was the Chief Procurator, who was the representative of the czars.

In 1917 the Kerensky government permitted a sobor to be called in Russia. It elected one Tikhon as patriarch. A year or two later the Bolshevik revolution occurred. Religion was proscribed and Tikhon was imprisoned.

As a sequence to the antagonism of the Soviet government to religion and its persecution of church dignitaries, many of the American adherents of the church decided to separate from the mother church administratively though

adhering to it spiritually. In 1924 they held an American "Sobor" in Detroit and selected one Platon Rodjesvensky as American archbishop or metropolitan. The asserted authority for the holding of this American diocesan sobor was a certain ukase—issued by Tikhon from his prison, but this decree by its terms would seem to be limited to dioceses in Russia. In any event the right of local self-government was clearly a temporary measure effective only until the central church was restored.

In the meantime in 1923 another "Sobor" had been permitted to be called in Russia. It selected a "*locum tenens*" or temporary head of the central church. There has always been some dispute among churchmen as to canonical validity of this sobor. About 1924 one Kedrovsky appeared in New York claiming to be the Metropolitan appointed by the Central Church authorities. Litigation was commenced in 1925, between the forces of Platon and those of Kedrovsky over the right to possess the cathedral which eventually reached this court and the Court of Appeals (*Kedrovsky* v. *Rodjesvensky*, 214 App. Div. 483, affd. 242 N. Y. 547).

Although Special Term ruled in that case in favor of Rodjesvensky and the American group this court reversed that decision and gave judgment in favor of Kedrovsky and the Central Church enjoining Platon Rodjesvensky from occupying the cathedral and that judgment was affirmed by the Court of Appeals. In that action both sides had claimed that the respective archbishops supported by them had been appointed by the central church authorities. Rodjesvensky claimed an oral designation by Patriarch Tikhon and Kedrovsky claimed to have a written appointment signed by that patriarch and also that his appointment was approved by the church dignitaries elected in the sobor held in 1923. The canonical validity of that sobor was one of the issues litigated in the former suit. This court upheld its validity at least as a de facto "Sobor" or convention. However, the parties to the present litigation all contend that the 1923 sobor was not canonically valid because, among other reasons, it was not universal or world-wide in character. We do not see that this ques-

tion of validity of the 1923 sobor alters the weight to be given to the earlier decision. The principle that controlled that decision was that the right to appoint the American archbishop was vested in the central church authorities.

After the decision in the earlier case by Special Term and before it was reversed by this court, a special act was adopted by the legislature (Laws of 1925, Chap. 463) incorporating plaintiff. This act provided that Russian Orthodox Saint Nicholas Church in New York might convey the cathedral property to plaintiff which was controlled by Platon Rodjesvensky and his followers in the American church. Thereafter a deed was executed purporting to convey the cathedral property from the old corporation to the new, but this deed was executed by only one of the two trustees. One of the issues presented in this case concerned the validity of that deed. We find, however, that it is unnecessary to discuss that issue as the question of legal title is not controlling.

For twenty years or more after the prior litigation Kedrovsky and his successors continued to occupy the cathedral on behalf of the mother church. In 1927 the Soviet government had permitted the Russian Orthodox Church to resume activities, but under a pledge of loyalty to the Soviet regime. In referring to this church as it existed from 1918 to 1927, the parties designate it the "Renovated" church as distinguished from the "Patriarchal" church.

In 1945 another sobor was held in Russia. It was world-wide in character and some delegates from the separated American group attempted to attend it. They did not reach Moscow in time, apparently due to interference by Soviet civil officials. But, a new patriarch, one Alexi was elected by this sobor, and the American church now recognizes him as the spiritual head of the Russian Orthodox Church. The American church on several occasions since 1945 has petitioned the patriarch to reunite the two churches but has insisted on the right of the American church to elect its own archbishop. Up to the time of trial of this action, efforts to effect reunion continued but the churches have never been able to agree on the question of autonomy, the authorities of the central church insisting on their right,

under canonical law, to appoint the American archbishop. It appears that in number the adherents of the American group or church largely exceed those in this country continuing to be connected to the Moscow patriarchate but in a church that is centrally organized the matter of numbers is not controlling on questions of church procedure (*Watson* v. *Jones*, 80 U. S. 679; Zollmahn, American Civil Church Law, pp. 178-185, 190-193, 197).

After Platon Rodjesvensky's death in 1934, one Theophilus was elected American archbishop by an American convention. Defendant Benjamin Fedchenkoff succeeded Kedrovsky upon the latter's death, having been appointed American archbishop by the central authorities of the church in 1934. His appointment has since been ratified and confirmed by Patriarch Alexi. These two dignitaries are the controlling archbishops involved in the present action which was commenced a day before certain legislation affecting the issues was enacted in New York in 1945 (Laws 1945, Chap. 693).

The present action took the form of a suit in ejectment and the parties discuss in the briefs the question of whether such a suit will lie and whether it is barred by the statute of limitations, but we feel that it is necessary to discuss only the principal issue as to whether, as contended by plaintiff, the archbishop selected by an American convention or, as contended by defendant, the one appointed by the central church authorities in Russia had the right to the use of the cathedral.

Special Term decided the issues in the present case in favor of defendants, representing the central church, thus following the principle enunciated in *Kedrovsky* v. *Rodjesvensky* (*supra*). It held that the 1945 statute did not lend any support to plaintiff's claim of its right to possess the cathedral. It applied the rule of common law that whenever a part of a centrally organized church breaks away to form a new society the temporalities are to be administered according to the rules of the ecclesiastical body to which the church corporation is subject. (*Westminster Church* v. *Presbytery of New York*, 211 N. Y. 214), and the further rule of common law that in a centrally

organized church whenever questions of discipline or ecclesiastical rule have been decided by the highest church tribunal within the church, the civil courts will treat that ruling as controlling (*Watson* v. *Jones, supra; Baxter* v. *McDonald,* 155 N. Y. 83).

The principal if not the sole contention advanced by plaintiff-appellant on this appeal is that Special Term misconstrued the 1945 statute. Before discussing that question we must note that after the decision by Special Term the 1945 statute was amended by Laws of 1948, Chapter 711. We will assume upon this appeal that plaintiff is entitled to the benefit of the law in its amended form (see *Gilpin* v. *Mutual Life Ins. Co.,* 299 N. Y. 293).

These two statutes added a new Article 5-C to the Religious Corporations Law, the general purpose of which was to define the Russian Church in America and to provide a procedure for the incorporation of churches to be affiliated with it.

Plaintiff points to several provisions in Article 5-C which it contends indicate that the purpose of the legislature was to declare that the American church has the right of autonomy in its relations with the Russian Orthodox Church. It contends that this statute warrants a judgment in its favor awarding it possession of St. Nicholas Cathedral.

First, plaintiff points to the provisions of Sec. 105 of Article 5-C of the Religious Corporations Law reading:

> "The Russian Church in America, as that term is used anywhere in this Article, refers to that group of Churches, Cathedrals, Chapels, Congregation Societies, Parish Committees and other religious organizations of the Eastern Confession (Eastern Orthodox or Greek Catholic Church), which were known as * * * (d) Russian Orthodox Greek Catholic Church of North America since in or about nineteen hundred twenty-four; and were subject to the administrative jurisdiction of the Most Sacred Governing Synod in Moscow until in or about nineteen hundred seventeen, later the Patriarchate of Moscow, but now constitute an administratively autonomous metropolitan district created pursuant to resolutions adopted at a general convention

(sobor) of said district held at Detroit, Michigan, on or about or between April second to fourth, nineteen hundred twenty-four."

It contends that this constituted a declaration by the legislature of this state that the American church was entitled to autonomy in its relations with the central church.

While this definitive section is far from a model of clarity, we find nothing in it to support the claim of plaintiff that the legislature intended to determine the issue of ecclesiastical autonomy existing between the two branches of the church. The clause found in the definition is merely descriptive in its historical reference to the administrative autonomy of the "Russian Church in America". Section 105 proceeds through subdivisions "a", "b" and "c" to refer to the groups constituting the earlier American church by reciting historical events connected with the development of the church in America, first as the American mission of the central church and then the American diocese of said church. In referring to the separation of the American church from the church in Moscow in 1924, subdivision "d" recites the historical events connected with that separation and refers to the purport of certain resolutions adopted at the Detroit convention for the autonomous status of the separated church. It does not purport, according to our construction, to set forth any legislative *finding* determining the ecclesiastical dispute as to the right of autonomy. At most it amounts merely to a legislative recognition of the fact that the American branch or "Metropolitan District" asserted its independence in administrative affairs in this country. It should not be construed to mean that the legislature has taken sides in the religious controversy as to the right of autonomy, involving the right to appoint or elect archbishops dependent as it is on the canon law of the church. Such a construction would show an intent by the legislature to interfere in ecclesiastical concerns which is hardly within the competence of legislative action (U. S. Constitution, 1st Amendment; New York Constitution, Art. I, Sec. 3), and certainly would be a departure from the traditional American principle of

separation of church and state. As was said in *McCollum v. Board of Education*, 333 U. S. 203, 212, in discussing the first amendment of the federal constitution:

> "For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."

Plaintiff then points to the provisions of Sec. 107 of Art. 5-C, claiming that they indicate a legislative intention to grant jurisdiction or authority to the American church over every Russian Orthodox church in the state, even those established prior to the creation of the "Metropolitan District" and never affiliated with the new group and to grant control to the American church over property of churches adhering to the ecclesiastical statutes or rules of the central Russian Orthodox church in Russia.

The provisions of Sec. 107 that every Russian Orthodox church incorporated before or after the creation of the autonomous "Metropolitan District" shall recognize and be subject to the jurisdiction of the governing authorities of the "Russian Church in America" must be read in the light of the definition of the "Russian Church in America" as set forth in Sec. 105. In other words, it appears to us that it was intended to mean that any church heretofore or hereafter incorporated for the purpose of adhering to the American church must be subordinate to the rules and the decisions of the authorities of the governing bodies of that church. Surely it was not intended to mean that Russian Orthodox churches formed for the purpose of adhering to the Moscow Patriarchate must be subordinate to the American church.

The control given trustees of the temporalities of the Russian Orthodox church in subd. 3 of Sec. 107 must be likewise limited. This subdivision does not purport to grant control to the "Russian Orthodox Church in America" to St. Nicholas Cathedral or any other property of the mother church. The general scope and purpose of the Religious Corporations Law is to authorize the creation of religious corporations as secular agencies to aid in the

conduct of church business and affairs, including the acquisition, holding and disposal of property (*Walker Memorial Baptist Church* v. *Saunders*, 285 N. Y. 462). But the state attempts no interference with the practices and rules of any spiritual body in the matter of its temporalities. We find no departure from this general policy in the provisions of Article 5-C. Sec. 107(3) simply provides that the trustees of a Russian Orthodox church (meaning Russian Orthodox Church in America) shall administer its own temporalities in accordance with the rules of the "Metropolitan District". We can find no suggestion in the present Article of any intention to transfer any beneficial interest of a religious trust in the St. Nicholas Cathedral to the "Russian Orthodox Church in America" contrary to the wishes of the supreme ecclesiastical authority of the beneficiary church.

That the legislature did not intend by these statutes to strip the Russian or central branch of the church of its property in New York is further evidenced by the fact that in other sections of the Religious Corporations Law the legislature has recognized the mother church in Russia as a living ecclesiastical body and has granted the Moscow Patriarchate certain powers with respect to church affairs (see Religious Corporations Law, Sec. 15, subd. 3; id. Art. 15; added by L. 1943, ch. 145). That these separate provisions with respect to the Moscow Patriarchate and the Russian Church in America are concurrently carried in the same statute indicates a legislative recognition of two separate and independent churches to both of which the legislature has granted the right to incorporate churches, conduct their own affairs and hold their own temporalities.

This brings us to consider the views expressed by our dissenting brethren. First, they disagree with our construction of Art. 5-C of the Religious Corporations Law, construing it, as does the plaintiff, to contain a grant of autonomy and a declaration in effect that the American church is entitled to the temporalities of all Russian Orthodox churches in this state. We have already dealt with this subject. Then they have taken a position which

we find that plaintiff does not contend for, which is in effect that the Russain Orthodox church in Russia is not a true church but a mere instrumentality of the Russian government, made so by the subservience of the high church authorities to that government and that therefore the American church is the only true Russian Orthodox church and has the right to possess the cathedral. In support of this theory the dissenting opinion proceeds with great vigor to attack communism, the prevailing political creed in Russia today, as atheistic and the Soviet government as a totalitarian despotism, and concludes that in fact no real religious activity would be or is permitted in Russia. They arrive at the determination that the present Russian Orthodox church is not a real, but merely a sham or phantom, church deprived of all power of action in respect to its followers and property in America by duress imposed by the Soviet State.

The dissenting opinion sets forth at considerable length the antireligious ideologies of communism, points out and condemns the totalitarian rule of the Soviet state and then concludes that any church that has pledged loyalty to such a government is not a true religious organization. The conclusion drawn is that a judicial finding is warranted that there is no restored Russian Orthodox church in Russia today. We concur entirely with the views of our brethren attacking communism. We yield nothing to them in their condemnation of the lack of religious freedom in Soviet Russia, but we disagree with the conclusion drawn as to the non-existence of the Russian Orthodox Church in Russia, because we believe that we may not draw that conclusion on this record, even if we might desire to do so.

We are dealing with a judicial action and we do not act on suspicion or news reports; we act solely on legal proof. We must consider the contentions of the parties and the proof they have chosen to submit except as to matters concerning which we may take judicial notice. Here, both parties have taken the position that the Russian Orthodox church is presently restored in Russia. Plaintiff introduced proof that since the last World War greater rights have been afforded to the Russian Orthodox church in Rus-

sia. Its witnesses recognized the 1945 sobor as authentic and as restoring the Moscow Patriarchate and accepted the restoration of the traditional church as a fact. Plaintiff makes no suggestion that the restored church is a new or different church, a mere state agency, as suggested in the dissenting opinion. Plaintiff and the American Russian church it represents choose to treat the Patriarchate Alexi as a holy man, a church leader and the Holy Synod as an existing hierarchy. The American church has repeatedly petitioned the Russian Church authorities to re-unite the American church to the mother church. Right down to the time of trial of this action, negotiations were proceeding for this rapprochement. The fact that the mother church was required to pledge loyalty to the Soviet civil regime and had agreed not to attack communism from the pulpit was apparently considered no obstacle to reunion. The only factor causing cleavage seems to be the insistance of the American church on its right to elect its own archbishop and the refusal of the mother church to yield that right unless at least the power of veto of any selectee was reserved to the high church authorities.

The plaintiff and the American church that it represents does take the position, as we understand it, that the "Renovated" church was non-canonical. But we are dealing with the church since 1945. Plaintiff recognizes the domination of the Soviet civil authorities over the present church and deplores its pledge of loyalty to the Soviet regime but concedes nevertheless that the old Russian Orthodox Church has authentically been restored at least since the 1945 sobor and is presently an existing though subjugated church. Perhaps this belief is fostered in whole or in part by religious convictions instilled by a faith that has been accustomed to look up to a mother church in Russia for the past 900 years. Plaintiff and those it represents certainly have the right to decide whether or not to believe in the existence of a true church and the genuine spiritual qualifications of its heirarchy. That judges may suspect that the parties have a wrong conception of what is going on in the church in Russia today is wholly immaterial. The parties have been in direct consultation with the representa-

tives of the church in Russia. Whether these church heads are truly religious men trying to keep the faith alive and to serve the religious needs of their people of Russia to the best of their ability or whether they are wiling and served tools of an anti-religious government is not to be decided by this court adversely to the contentions of the parties on any theory that we may take judicial notice of actual conditions behind the "iron curtain" in Russia today. Such matters are not so notorious as to be subject to the rule of judicial notice.

When we accept the attitude of the parties as to the existence of a restored Russian Orthodox Church in Russia today, the issue presented in this case becomes a simple one and the rule of law controlling its decision is plain. The law requires us to hold that the decision of the church judicatories on the question of whether bishops must be appointed or may be elected must be controlling on us, and the right to use the cathedral would rest in the archbishop selected by those judicatories.

While the importance of this decision cannot be gainsaid, we are unable to agree with our dissenting brethren as to its scope or effect. It involves no question of the denial of religious freedom to any group nor is any group being ousted from its place of accustomed worship. The forces behind the plaintiff in this case have not been in possession of Saint Nicholas Cathedral since the decision in the Kedrovsky case (*supra*) almost a quarter of a century ago. The present determination does not reach beyond the right to use and control a single church property built and maintained with funds supplied by the mother church in Russia. This decision is at least partly controlled by New York statute law which can have no extraterritorial effect. If and when it should appear that the Russian Orthodox Church is no longer existent in Russia or if and when the legislature of this state may make appropriate disposition of property within this state found to be subject to its control and disposition, our courts may take other action. Thus far we find no declaration by the legislature and no proof offered to this court that the

trust purposes for which plaintiff holds the cathedral have been extinguished or terminated.

Meanwhile plaintiff holds at least the nominal legal title to the property involved. For as long as it may continue to do so the plaintiff remains in a position to protect whatever claims the American church may have to the cathedral.

Accordingly, we have reached the conclusion that the defendant is entitled to prevail.

The judgment appealed from should be affirmed.

COHN and SHIENTAG, JJ., concur.

Opinion of VAN VOORHIS, J. SUPREME COURT, APPELLATE DIVISION—FIRST DEPARTMENT, JUNE, 1949. EDWARD S. DORE, J. P., ALBERT COHN, JOSEPH M. CALLAHAN, JOHN VAN VOORHIS, BERNARD L. SHIENTAG, JJ. SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH OF NORTH AMERICA, Appellant, *v.* JOHN KEDROFF and BENJAMIN FEDCHENKOFF, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church, Respondents. 2423.

VAN VOORHIS, J. (dissenting): The dissenting justices concur with the majority, nor is there disagreement in the court, in condemning the attitude and conduct of the government of the Soviet Union toward religion. The difference in opinion relates entirely to whether, in view of the canons, ecclesiastical practices and history of the Russian Orthodox Church, the law of New York State requires that the material possessions of its American branch must continue to be administered from Moscow while the Patriarch and Holy Synod there are as plaintiff contends dominated and controlled by the Soviet atheistic regime. Our dissent is based upon the view that the law does not require this result.

The immediate subject of this action is the right to occupancy and control of St. Nicholas Cathedral on East 97th Street in New York City. In order to decide that question, it is necessary to determine who at this time is deemed to be in administrative control of the Russian Orthodox Church in America, since that official is entitled to occupy

and control the cathedral. The outcome of this suit therefore depends upon who is to have charge of the temporalities of the entire Russian Orthodox Church on this continent, including churches, parish houses, rectories and revenue producing properties. Plaintiff represents a large group of Russian Orthodox churches which have proclaimed the independence of the American branch from administrative control by the central church authorities in Moscow while dominated by the Soviet state. Defendant Benjamin Fedchenkoff has been designated by the Patriarch while under such domination as archbishop and metropolitan to rule over the Russian Orthodox Church in the United States and elsewhere in North America. The autonomous group has created no doctrinal schism, and its members desire to worship in their ancestral churches according to their ancient forms, but without being subject to administrative control by a central organization which has become subservient to the Soviet state. The judgment appealed from, in denying to plaintiff the occupation and control of St. Nicholas Cathedral, necessarily determines that plaintiff and its affiliated churches to which belong most of the communicants of the Russian Orthodox Church in the United States, have lost the right to the enjoyment of their properties while they continue to refuse to recognize the administrative acts of the Russian central church authorities.

It seems to us that, instead of being schismatics, the group in American to which plaintiff belongs is adhering, in so far as possible, to the Orthodox tradition, from which the Russian high church authorities departed when, yielding to force, they accepted what might be termed the Russian Orthodox Church of the Communist Obedience. These ecclesiastical officials, in Moscow, having become in fact an instrumentality of the Soviet Government, have ceased to function as the church tribunal to which the civil courts must look in ordering disposition of temporalities in this country, and the conventions (sobors) of the Russian Orthodox Church in America have, for a period of indefinite duration, taken their place as the authority to be followed by us respecting property of the Russian Orthodox Church

within this jurisdiction. The New York State Legislature has recently so declared in clear and, as it seems to us, unmistakable terms (Chapter 817 of the Laws of 1945; Chapter 711 of the Laws of 1948).

Although the Church in Russia was aided financially and subjected to political influence by the czars, one is not justified in assuming, nor does the majority opinion go so far as to state, that the Orthodox Church in Russia was ever before sought to be reduced by government to a condition approximating that of being a mere communist front. The majority opinion admits that religion was proscribed and the Orthodox Church in Russia persecuted by the Soviet Government.

This record and facts to which we may not blind ourselves show that religious liberty in Soviet Russia is nonexistent; that the Church has lost its independence and freedom of action under superimposed political pressures; that the government in Russia does not permit freedom of activity to the Church itself or its judicatories; that the political creed of the controlling power in Russia is essentially atheistic; that the Soviet regime is anti-religious; that the supreme church authority in Russia has pledged itself to the government of the communistic atheistic state, and the Church in Russia is under involuntary restraint of the civil authorities. In such state of facts, how can it reasonably be said that the central organization of the Orthodox Church in Russia is able to function as the governing entity of a Christian religious society? If neither the church nor its head are free, their administrative acts are not their own but those of the Soviet state.

It is fundamentally erroneous to treat St. Nicholas Cathedral and the parishes comprising at least four-fifths of the Russian Orthodox churches in the United States as schismatics, for the reason that the desire to retain their ancient faith and order, unmolested by the group which has seized power in Russia, and has seized the church for its own uses. The repeated efforts of these American communicants to achieve some tangible expression of their spiritual unity with believers in Russia, but without being subject to the formal functioning of the central church or-

ganization as a department of the Russian state, should count in their favor in this action. Their adherence to tradition is one of the indications that they are not the chief divisive element, but rather that, in truth and in fact, it is the church in Russia that has been constrained. The distinction between spiritual communion in faith and administrative control must be kept in mind. Christianity cannot permanently be suppressed in Russia. That is something which principalities and powers have been unable to accomplish from the beginning. But it is hardly facing the facts if one fails to realize that the present Russian government has done and is doing all that is politically possible to extirpate it, except as a mere form for purposes of Soviet aggrandizement, and that such persistence as the religion has manifested there since the Revolution has come from the bottom up rather than from the top down. The problem *sub judice,* as both the trial court has held and as this court is holding, concerns the identification of the beneficiaries for whose use and enjoyment St. Nicholas Cathedral and the other temporalities in this country were dedicated. Instead of disputing the trust principle, the plaintiff stands upon it. The difference in point of view is that plaintiff maintains that these temporalities are torn away from their intended use, if they are held to be subject to the jurisdiction of officials who could not function in Moscow, whatever pious names they bear, except on the dictates of a government whose every action indicates that its political philosophy is based upon the destruction of what Christians of all denominations hold to be dear.

Recognition of these facts does not place the courts or the Legislature in the fields of theology or of ecclesiastical jurisdiction; it is necessary for the civil authorities to act upon them in ascertaining and identifying the "church judicatories" mentioned in *Watson* v. *Jones,* 80 U. S. 679, whose word in those fields is to be accepted as final in ordering the temporal concerns of religious corporations.

The statement in the majority opinion that the central church organization in Russia was sufficiently real for the Russian Church in America to deal with it and seek re-

union, is answered by the utter frustration of those efforts. The 1945 sobor in Russia was "universal" in character only if we ignore the subterfuge whereby the American delegates were detained in Siberia until the sessions of the sobor had been completed. This maneuver is not to be brushed aside as having been done by the Russian "civil" as distinct from ecclesiastical Authority. The Patriarch did not deplore but availed himself of it, refused to give a hearing to the American delegates, and handed them an uncompromising ultimatum upon arrival based upon action that had been taken in their absence. This incident illustrates the closeness of the connection between the civil and high ecclesiastical authorities.

That was the sobor at which the present Ruling Patriarch Alexi was chosen, who is to have rule over St. Nicholas Cathedral and the rest of the Russian Orthodox churches in the United States if the judgment below is affirmed. Always the American delegates safeguarded their declaration of administrative independence, by expressly adhering to their refusal to acknowledge any connection with the church in Russia as a formal functioning organization while under Soviet dominance. Reunion upon the terms of the American delegates would have required a fundamental change in the present relation in Russia between church and state. No such reform was forthcoming, and the situation remained as before. This willingness to be in spiritual communion amounted to no waiver of rights by the autonomous body in America. Neither did the 1946 sobor in Cleveland, Ohio, sacrifice administrative independence. Its effect was to reamphasize that no doctrinal schism separated the mass of believers in Russia and in the United States, but that there must be administrative independence while the identity of the church organization in Russia remains merged in the Soviet state. American members of the Russian Church are not responsible for what has happened in the Kremlin.

When the proposition is thus stated, it is beside the point that Soviet citizens are permitted to own property in the United States. That has no relation to whether St. Nicholas Cathedral and the other Russian Church temporalities in

America have been dedicated to the use of those who have been, or who desire to be, identified with the traditions of this religious society as they existed before its central organs were subverted by Soviet power.

In order to approach more closely to the problem presented for decision, it is necessary to review briefly the development of the autonomous group in America, culminating in the recognition by the Legislature of this group in 1945 and in 1948 as the successor to "that group of churches, cathedrals, chapels, congregations, societies, parishes, committees and other religious organizations of the Eastern Confession (Eastern Orthodox or Greek Catholic Church) which * * * were subject to the administrative jurisdiction of the Most Sacred Governing Synod in Moscow until in or about nineteen hundred seventeen, later the Patriarchate of Moscow, but now constitute an administratively autonomous metropolitan district created pursuant to resolutions adopted at a general convention (sobor) of said district held at Detroit, Michigan" in 1924 (Article 5-C, Religious Corporations Law, enacted by L. 1945, c. 493, and L. 1948, c. 711).

From April 2 to April 4, 1924, clerical and lay delegates of parishes of the Russian Orthodox Church of North America met in convention at Detroit, Michigan, to consider how to free themselves from Russian secular domination. The acuteness of their problem arose from the Russian revolution's character, and its impact upon the historical ties between Russian Orthodox churches in America and the ecclesiastical governing bodies or officials in Russia. The situation was complicated by the connection which had existed between the czarist government and the Russian church. The St. Nicholas Cathedral building on 97th Street, in New York City, involved herein, was constructed in 1903, with money some of which was supplied by the then czarist Russian Government and by the Church in Russia.

The old regime in Russia gave way to a new one which did more than expect political reciprocity from churches. It militantly proclaimed that religion is merely the opium of the people, that the soul of man has no significance, and

man himself none, except as merged in the State. So all-embracing are its claims, that it does not tolerate literature, art, music, science or religion except in complete subordination to and in the service of ends of the Soviet state. The office of patriarch was restored in 1917, but that important church dignitary, however much against his will, became a creature of the Soviet Government. "There is no doubt," said one of the delegates at the 1924 Detroit convention, "that we all stand for the patriarch. But, do you know that he would be thankful to us if we separated from him. By such an act we would relieve his heavy cross."

The delegates to this Detroit convention of 1924 recognized their underlying spiritual kinship with their Russian brethren, voted "not to break at all the spiritual ties and communion with the Russian Church, but always to pray for her good, give her every cooperation and mention the Most Holy Patriarch as the head of the Russian Mother Church to which the American Church is obligated for her existence", and they looked forward to a time when the relationship between the Russian and the American churches might be ordered by an œcumenical council of the entire Russian Orthodox church "with the participation of representatives of the American Church under conditions of political freedom, guaranteeing the fullness and authority for its decisions for the entire church"; but this convention resolved, nevertheless, "temporarily", until such a council could be convened, "to declare the Russian Orthodox Diocese in America a self governed Church so that it be governed by its own elected Archbishop by means of a Sobor of Bishops, a Council composed of those elected from the clergy and laity and periodic Sobors of the entire American Church." A procedure was authorized to establish "a new constitution of the American Church."

The use of the word "temporarily" is shown by the context to mean until, and not before, the dictatorship of the proletariat withers away, to an extent necessary to enable an œcumenical council to be held at which representatives of the American church can participate under conditions of political freedom.

The context shows that the mention of the Patriarch as the head of the Russian Mother Church, to which the majority opinion ascribes so much importance, was an expression of the reverence which the devout churchman has for the priestly office, that exists without relation to the conduct of the man who holds it. It is not clear by what reasoning it can be argued that in revering the office of patriarch, these American delegates were sacrificing the independence which they were at pains to assert as an essential condition of any rapprochement, nor that they were surrendering their well founded contention that the official acts of the patriarch are controlled by the Soviet state. No one is concerned with attacking the character of Patriarch Alexi for yielding to the demands of the Russian dictatorship, nor in praising him for casuistry in so doing. The determining fact, which stands out above everything else in the record, is that if Patriarch Alexi did not administer the Russian Church so as best to promote the spread of atheistic world communism, in the judgment of the Russian chiefs of state, he would quickly have been superseded by another who would have done so. If the directives of such an official are to be binding upon the traditional branch of the Russian Church in America, it has a just grievance.

A constitution was prepared and adopted by the autonomous Russian Church in America, and at a convention held in Cleveland, Ohio, November 20 to 23, 1934, Archbishop Theophilus Pashkovsky was elected metropolitan, and certain so-called normal statutes for parishes were adopted. If plaintiff-appellant is successful in this action, Archbishop Theophilus will conduct the religious services in the cathedral as metropolitan, as the duly selected head of the Russian Orthodox Church in North America.

In 1935 the Moscow Patriarchate issued a decree suspending Metropolitan Theophilus, and purporting to prohibit him from performing divine service "until either he repents or the ecclesiastical court shall have rendered a decision." The Patriarchate of Moscow had previously declared null and void the proclamation of the autonomous nature of the North American Diocese, which was described as "An act rudely violating Church Discipline." Defend-

ant--respondent Archbishop Benjamin Fedchenkoff was proclaimed by Moscow "as permanent Ruling Bishop of the Russian North American Diocese with the title of Archbishop of the Aleutian Islands and North America, also reserving to him the status of Exarch of the Moscow Patriarchate in America, and also granting to him the right to wear the cross on his Klobuk; to accept with recognition as such."

Thus, the outcome of this case involves more than whether Archbishop Theophilus shall conduct the services in the cathedral: on it depends whether the communicants of the Russian Church in America who refuse to submit to Soviet overlordship, shall within our jurisdiction have the use of the church buildings, revenues and other temporalities of their traditional church.

It is unnecessary further to detail the efforts of the American branch of the Russian Church to establish its administratively autonomous status, as shown by the record, nor to outline the particular steps by which the Soviet Government has pursued the policy of seizing the machinery of religion in order to control the minds of men. As phrased in the dignified statement of the American delegates, who vainly sought to achieve a *modus vivendi* on their mission to Moscow in January 1945: "It was no fault of the American branch of the Russian Orthodox Church that by force of circumstances it was compelled to establish its own church administration. It was no fault of the American Church that the Patriarchate laid a suspension on it because its clergy declined to give a pledge of loyalty to the Soviet power."

Respondents' position is lucidly and briefly stated in the motion by respondents' counsel to dismiss the complaint at the close of plaintiff's evidence at pages 268-278 of the record, and in the resume of the Gregory Tchukov testimony at pages 271-278.

The grounds that plaintiff cannot maintain an action for ejectment, and that this action is barred by the statute of limitations or laches, do no require comment. The decision of the trial term in not based upon them, and they are effectually answered in appellant's brief. The important

ground, upon which the decision of the case was made at trial term, is that plaintiff holds title to the St. Nicholas Cathedral properties on 97th Street, as trustee for the duly accredited archbishop appointed by the supreme church authorities in Russia, and that the case of *Kedrovsky* v. *Rodjesvensky* (214 App. Div. 483, affd. without opinion 242 N. Y. 547) held that an archbishop appointed by such authorities is the only person who has the right to possess, occupy and use that cathedral.

The Tchukov testimony is that as a result of enactment of a general convention (sobor) in Russia in 1917-18, the Patriarch and the Holy Synod, of which the Patriarch is the head, are the supreme authority of the Russian Church, that the American branch of the Russian Church is a diocese of the Russian Orthodox Church, and is ruled by an archbishop appointed by the supreme church authority which may suspend or remove such archbishop and appoint another in his place at its pleasure. He further stated that canon law, and the rules and usages of the Russian Orthodox Church, do not permit any diocese or any subdivision or constituent part of the church, for any reason whatsoever, to secede from or declare itself independent of the main branch of the church at large, or declare itself autonomous or a self-governing body or district. He testified that the action of the group of Russian Orthodox churches in America, and the resolution adopted by them in the convention in Detroit of 1924, and the purported election of the predecessor of Archbishop Theophilus as the archbishop of said churches violates these canons, rules and usages, and specifically he added:

> "Saint Nicholas Cathedral, in accordance with the rules and usages of the Russian Orthodox Church, must be possessed, occupied and used by the Archbishop of the American Archdiocese, who is duly appointed by the Supreme Church Authority, above referred to, namely, the Patriarch and the Holy Synod, and said Cathedral may not be occupied by any other official or person."

If this position, upheld by the trial court, be correct, it means that the courts and the Legislature are powerless to accord to these American communicants of the Russian Church the use of their accustomed church buildings, and other temporalities, unless they submit to the high church authorities in Russia, who are captive to the Soviet government. We think that this would be exalting form above substance.

In reversing the judgment appealed from and deciding in favor of the plaintiff as the representative of the autonomous Russian Church in America, there would be no conflict with the rulings in *Watson* v. *Jones* (80 U. S. 679) or *Trustees of Presbytery* v. *Westminster Church*, (222 N. Y. 305). Those cases hold, as sec. 5 of the Religious Corporations Law declares, that the "temporalities and property, real and personal," belonging to a religious corporation are to be administered "in accordance with the discipline, rules and usages of the corporation and of the ecclesiastical governing body, if any, to which the corporation is subject, and with the provisions of law relating thereto."

It is readily conceded that the rule no longer obtains in New York State that a religious corporation holds its temporalities free from regulation by any ecclesiastical authority, or by a tenure so independent that it could change its creed or denominational character without losing its hold upon its property (*Westminster Church* v. *Presbytery of New York*, 211 N. Y. 214).

Respondents are also correct in asserting that it was formerly the practice in the Russian Orthodox Church in America for its archbishops and bishops to be subject to administrative control by some higher church authority, although the composition of such authority has changed from time to time, as when the office of Patriarch was abolished in 1700 and so remained for two centuries until it was restored in 1917.

The essential point on which we consider that the trial court erred, and on which we differ with the majority of this court, is the failure to recognize that approval or direction by the high church authorities in Russia has lost all canonical significance, while those authorities have been

deprived of their freedom of action. It is as though they were constantly, and in all things, subject to duress, and subjected to duress by a government founded upon principles inimical to the existence of any Christian church. Their action or inaction is, therefore, nugatory.

"'Duress exists,' says Judge Cooley, 'when one, by the unlawful act of another, is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will.' *Hackley* v. *Headley*, 45 Mich. 569, 574, 8 N. W. 511. Duress by the government or its officers, in this class of cases, is defined by the supreme court as 'moral duress not justified by law.' *Maxwell* v. *Griswold*, 10 How. 242 256, 13 L. Ed. 405. It must be the pressure arising from unlawful acts or demands on the part of the government or its officers to produce that constraint of will or action, or state of necessity or compulsion, which render acts voluntary in form involuntary and void." (*Newburyport Water Co.* v. *City of Newburyport*, 103 Fed. 584, 594.)

Under conditions existing today, it would be an idle ceremony, void of all religious or ecclesiastical meaning, to call for approval by the so-called Supreme Church authorities in Russia of the selection of an archbishop to preside over the American branch of the Russian Church. The only theory on which such an act could signify anything, would be that the Russian government is exercising a lawful function in utilizing the machinery of church organizations, however deviously, to promote worship of the Russian state and its leaders. We cannot recognize the validity of such a procedure, especially where the purpose is clearly to use the Russian Orthodox Church in America as an instrument of foreign Soviet propaganda here. That such conduct, offensive to our public policy, has been engaged in by a government recognized by the United States, affords no reason why it should be upheld in our courts (*Vladikavkazsky Ry. Co.* v. *N. Y. Trust Co.*, 263 N. Y. 369, 378-9, citing *Baglin* v. *Cusenier*, 221 U. S. 580). This is in accordance with declarations of public policy by the State Department of the United States. In recent public pronouncements the State Department, and our representatives

in the United Nations, have frequently recognized and denounced the suppression of human rights and basic liberties in religion as well as in other aspects of life, existing in Soviet Russia and in all of its satellite states. The President of the United States has publicly characterized such efforts as a campaign to turn religion into a tool of the state (Armistic Day Address, November 11, 1949).

Even the intellectual and spiritual ties by which men are held together, are so controlled by the totalitarian state as ultimately to disintegrate all autonomous groups outside of the state itself, or the single political party that rules it. That technique is applied to scientific and cultural as well as to religious groups, so that ultimately no autonomous group with any independence remains. In the final analysis, the state and the state alone becomes all. It involves a retreat from reality if we do not clearly see that. In this case the technique of suppression, and the attempted use of a religious group merely as an instrumentality to serve the all-embracing and dominant ends of the Soviet state, is the real issue presented. The so-called "Russian church at large", so frequently mentioned by respondents, is in reality and unfortunately the Russian church group whose high ranking functionaries have been completely subjected and dominated by the men who control the Politburo, and the relatively small group that constitutes "the party", through whom the vast millions in Russia and Soviet-dominated satellite countries are regimented and controlled.

The case of *Kedrovsky* v. *Rojdesvensky* (214 App. Div. 483, affd. without opinion 242 N. Y. 547) has mistakenly been regarded as controlling. In that case, it is true, the same group now represented by plaintiff was defeated, and the representatives of a group styled as the "Living Church", "Renovated Church" or "Soviet Church", were held entitled to this cathedral. As a result of that decision, Archbishop Kedrovsky occupied it until his death in 1934, and his son, the defendant John Kedroff, remained there until his retirement ten years later. Archbishop Bejamin Fedchenkoff, whose right to occupation of the cathedral is confirmed by the judgment appealed from, does not claim through Kedrovsky, nor through his son, the defend-

ant John Kedroff. Respondents in this case concede that Archbishop Kedrovsky's appointment was uncanonical, and that the group represented by him had no standing and is now extinct. Thus, in the testimony of Tchukov, it is stated concerning the 1923 convention (sobor) in Russia, from which Kedrovsky derived his supposed canonical status: "This sobor is not regarded as having met with canonical requirements because it was not called by the Patriarch and the Holy Synod. However, within a few years thereafter, these Church movements subsided and practically all of the leaders, adherents and parishes of this Church joined with and were absorbed by the Patriarchal Church." He also stated that the resolutions of this sobor "shortly became a dead letter," and "that the constituent parties of the Sobor of 1923 shortly died out and the Patriarchal Church functioned effectively and without restraint."

When the case of *Kedrovsky* v. *Rojdesvensky* was in the courts, it evidently did not suit the purposes of the ruling power in Russia to furnish evidence to establish the lack of canonicity of the group which succeeded in that lawsuit. That circumstance should result in scepticism concerning the present assertion, that since the extinction of the winning faction in that action "the Patriarchal Church functioned effectively and without restraint." As stated by Lord Mansfield in *Blatch* v. *Archer* (Cowp. 66): "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted" (quoted in II Wigmore on Evidence, section 285). It does not exceed the limits of judicial notice to recognize that in this action defendant Benjamin Fedchenkoff, like Kedrovsky in the prior action, had access in Russia to whatever helpful documentary or other evidence respondents needed, whereas the door to obtaining similar proof in plaintiff's behalf was undoubtedly closed, as it was to Archbishop Platon in the prior case. Were it to suit the purposes of the ruling caste in Russia at some future time to disavow the authority of Archbishop Benjamin, there is little doubt that the lack of it could be demon-

strated as effectively as has been accomplished in the case of Archbishop Kedrovsky, who appeared to possess the tokens of investiture when he was in court a quarter of a century ago.

Nevertheless, it is urged, and has been held, that the *Kedrovsky* case controls, on the theory that it established that whoever is to be the rightful incumbent of St. Nicholas Cathedral, must have obtained the approval of the Patriarch and Holy Synod in Russia.

In considering the *Kedrovsky* case, decided in 1925, it should be borne in mind that the relationship of the Russian government to churches was not and could not have been widely known, to the extent that has since been manifested in Russia and its satellite countries. The situation has become so obvious and acute that, since the *Kedrovsky* case was decided, the Legislature has recognized the administratively autonomous group established at the 1924 Detroit convention, and subsequent conventions, as being the traditional branch of the Russian Church in America. If *Kedrovksy* v. *Rojdesvensky* were otherwise held to be controlling, its effect would have been overcome by these Acts of the Legislature. Article 5-C was added to the Religious Corporations Law by Chapter 693 of the Laws of 1945, and amended by Chapter 711 of the Laws of 1948. The amendment, effective March 31, 1948, was evidently intended to interpret rather than to change the content of the 1945 Act. (*Peo. ex rel. Westchester Fire Ins. Co.* v. *Davenport*, 91 N. Y. 574; Sutherland: Statutory Construction, 3d ed., sec. 1931, p. 418) and is of especial interest since it became law after the decision was rendered herein by Trial Term, and interprets the 1945 statute otherwise than as if was construed in Trial Term's opinion, as is pointed out hereafter.

In analyzing these statutes, it should be recollected that the purpose of the Religious Corporations Law is to deal with the temporalities of religious societies, and to insure that they will be administered for the benefit of the societies for which they have been dedicated (*Walker Memorial Baptist Church* v. *Saunders*, 285 N. Y. 462, 472; *Watson* v. *Jones*, *supra*). There is no attempt by the state, acting

either through the Legislature or the courts, to enter into matters of doctrine or ecclesiastical law, except only in so far as necessary to the administration of real or personal property. In *Watson* v. *Jones*, in discussing controversies arising in the civil courts concerning property rights of religious societies, in an often quoted statement, the Supreme Court said (p. 727):

> "In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."

This principle is embodied in section 5 of the same chapter of the Consolidated Laws to which Article 5-C of the Religious Corporations Law was added in 1945 and 1948. The Legislature undoubtedly bore this principle in mind when in enacting Article 5-C it declared the autonomous group, represented by this plaintiff, to be the true successor and representative in America of the Russian branch of the Eastern Orthodox or Greek Catholic Church, and therefore entitled to "the custody and control of all temporalities and property, real and personal, belonging to such church and of the revenues therefrom * * *" (sec. 107, e. Religious Corporations Law). When Article 5-C was added, at least four-fifths of the parishes in the United States had joined the autonomous group, and declared themselves administratively independent of Moscow. They had firmly and convincingly avowed that the Synod and the Patriarch had lost their freedom of action, and that their ostensible administrative acts were therefore not their own. They had become puppets. It was within the competence of the Legislature, as it would be within that of the courts in the absence of legislation, in searching for the "church judi-

catories" mentioned in *Watson* v. *Jones*, whose decisions on questions of ecclesiastical rule are to be final, to determine that the higher church authorities in Moscow have become a phantom, a mere semblance having the form but not the substance of organs of the Orthodox Eastern Church, and that while under such duress their action may be treated as void or superfluous. The legislature has expressly determined that, in this instance, the church judicatories whose determinations are to be followed, are the Detroit and Cleveland conventions of 1924 and 1934 and the New York convention of 1937.

The case of *Watson* v. *Jones* involved a decision in a Presbyterian parish in Kentucky over the question of slavery at the time of the Civil War. It was held that the independent faction in that parish was subject to the Presbytery, Synod and General Assembly of the Presbyterian Church in the United States, even though it disagreed on the question of slavery. There was no such factor in that case, as in this, that the organs of the general church had ceased to have anything but a formal ecclesiastical existence of their own, and had been in reality merged in an atheistic state. To regard the high church functionaries in Russia as having administrative freedom independent of the Russian government, is as unwarranted as it would be to attempt to distiguish between the Russian state and any other communist front.

The extended narration of the history of the Russian Church in America contained in sec. 105 of Article 5-C of the Religious Corporations Law, appears to have been inserted in order to leave no room for dispute that the "group of churches, cathedrals, chapels, congregations, societies, parishes, committees and other religious organizations of the Eastern Confession (Eastern Orthodox or Greek Catholic Church)" which had been known historically by various names, enumerated in the statute, including that of "Diocese of North America and the Aleutian Islands", and which "*were subject to the administrative jurisdiction of the Most Sacred Governing Synod in Moscow until in or about nineteen hundred seventeen, later the Patriarchate of Moscow*" do "*now constitute an administratively*

autonomous metropolitan district created pursuant to resolutions adopted at a general convention (sobor) of said district held at Detroit, Michigan, on or about or between April second to fourth, nineteen hundred twenty-four." (Italics supplied.)

The structure of this statute is not such as to provide for the incorporation of new parishes in a new religious denomination, as the majority opinion indicates, without reference to the Russian Orthodox Church as previously organized in America. This statute gives civil recognition to the action taken at the Detroit sobor in 1924, which was not concerned with organizing new parishes but in severing the old ones from control by Moscow. In plain language it describes the Russian Orthodox Church, identifying it by all of the names under which it had been known historically in this hemisphere since 1793, and then declares that this same church organization in America which was previously subject to control by the central church authorities in Moscow shall be so no longer, but shall constitute an administratively autonomous district to be known as the "Russian Church in America", erected by conventions held in the United States. Neither do we think that such a clearly stated intent on the part of the Legislature in 1945 and 1948 to act in respect of this very situation, should be nullified for the reason that in 1943 a minor amendment was passed to an old section of the Religious Corporations Law affecting the powers of trustees of the four Orthodox Greek Catholic Primary Jurisdictions in America—Constantinople, Antioch, Serbia and Moscow (L. 1943, c. 145, sec. 1, amending Rel. Corp. Law sec. 15, subd. 3), nor for the reason that in the same year (1943) a new article was added (Article 15) providing for incorporation of parishes of churches subject to any of said four Primary Jurisdictions. In any event, the 1945 and 1948 legislation, applying to this particular situation, should be held to control over the former more general enactments and, if necessary, to have repealed them *pro tanto* (*Strauch* v. *Town of Oyster Bay*, 263 App. Div. 833; *Wood* v. *Wellington*, 30 N. Y. 218).

Subdivision 1 of section 107 of Article 5-C provides that every orthodox church in this state shall recognize and be

and remain subject to the administrative authority of the governing bodies and officials of "the Russian Church in America, pursuant to the statutes for the government thereof adopted at a general convention (sobor) held in the city of New York on or about or between October fifth to eighth, nineteen hundred thirty-seven, and any amendments thereto and any other statutes or rules heretofore or hereafter adopted by a general convention (sobor) of the Russian Church in America and shall in all other respects conform to, maintain and follow the faith, doctrine, ritual, communion, discipline, canon law, traditions and usages of the Eastern Confession (Eastern Orthodox or Greek Catholic Church)."

Section 107, 3, provides for the further administration of the temporalities in accordance with church by-laws, and of the statutes for parishes of the Russian Church in America approved at a general convention thereof held at Cleveland, Ohio, from November 20 to 23, 1934, and any amendments thereto and all other rules, statutes, regulations and usages of the Russian Church in America. The Cleveland convention, held on the dates specified in this statute, was the one which named Archbishop Theophilus Pashkovsky to preside over the Russian Church in America, who will occupy St. Nicholas Cathedral if plaintiff succeeds.

Trial Term took, as we think, too restricted a view of Article 5-C of the Religious Corporations Law, in holding it "applicable only to Russian Orthodox churches which might thereafter be organized (section 106) or which, having theretofore been incorporated should thereafter be reincorporated (section 108)," and in holding that "Since St. Nicholas Cathedral falls within neither of these categories, it follows that its use is not subject to the direction of the Russian Church in America." After Trial Terms' decision, Article 5-C of the Religious Corporations Law was amended, not only so as to insert the word "administrative" to characterize the independence from Moscow of the American body, but also so as to define the application of Article 5-C to "*every Russian Orthodox church in this state, whether incorporated before or after the creation of said autonomous metropolitan district, and whether incor-*

porated or reincorporated pursuant to this article or any other article of the religious corporations law, or any general or private law." (Emphasis supplied.) This language was not intended to limit the application of Article 5-C to churches thereafter incorporated or reincorporated under that Article. Plaintiff was incorporated by a private law known as Chapter 463 of the Laws of 1925, and its corporate existence was confirmed, moreover, by Chapter 817 of the Laws of 1945, by the same Legislature which added Article 5-C to the Religious Corporations Law. We think that Article 5-C, particularly as it was amended and construed by Chapter 711 of the Laws of 1948, was intended to relate to plaintiff, and to direct the courts by what authority the temporalities of the Russian Church in America are to be administered.

In order to accomplish its purpose, this act need not be an expropriation statute, such as that which deprived the Mormon Church in Utah of property which was subsequently used for common schools (*Mormon Church* v. *United States*, 136 U. S.), nor must it involve what Trial Term further described "as a *transfer* of property of all orthodox churches in this country to the use of the newly recognized 'Russian Church in America'" (emphasis supplied). All that was intended by these statutes, being all that was necessary to the end in view, was to determine that the Russian Church in America, as defined in these acts, is the traditional Russian Orthodox Church on this continent, that the communicants are legally entitled to worship in the same buildings and have the use and revenues of the other temporalities which they had previously enjoyed, that they are not to be put out or kept out of possession upon directions emanating in reality from the Kremlin, and that the Synod and the Patriarch in Moscow are to be regarded as having no present functional existence apart from the Soviet Government. The Legislature recognized the Detroit convention of 1924, and subsequent conventions in this country, declaring the autonomous Russian Church in America to be the same religious society which had previously been known in this country by the

other names which had been borne here by the Russian branch of the Eastern Orthodox or Greek Catholic Church.

Statute does not infringe the constitutional guarantee of religious liberty nor the separation of church and state, which provides for a decent separation here between the Church and the Russian state. Statutes are presumptively constitutional (*Buoneto* v. *Buoneto*, 278 N. Y. 284), and the constitutionality of Article 5-C of the Religious Corporations Law is not subject to attack if the administrative acts of the Russian central church authority are controlled by an anti-religious dictatorship. Nothing in the cases of *Watson* v. *Jones* or *Trusteeship of Presbytery* v. *Westminster Church* holds that the state, acting through courts or legislature, cannot trace and identify under changed circumstances the religious society for whose benefit temporalities have been dedicated. Legislatures and courts have more than once been called upon to ascertain what has become of the group which the founders meant to endow, to identify it behind a changed facade, or to decide by *cy pres* what is the religious society that most nearly resembles the original if the latter has become extinct or altered beyond recognition. Construed as a legislative ascertainment under conditions now existing in the world, of the organized religious society for whose use the temporalities here in question had been dedicated, no question of constitutionality arises. Traditional Russian Orthodox parishes in the United States have declared, in effect, that they are, and as of right ought to be, free from administrative control by an aggressively atheistic Russian state. The Legislature has merely confirmed the existence of this well known fact, and has not caused any deprivation of property without due process of law, nor interfered with religious liberty. On the contrary, it has provided for the enjoyment of this property by its accustomed beneficiaries.

The majority of this court professes to be in ignorance concerning whether the domination of the central church authorities by the Russian state is really a fact, and rebukes the minority for being guided in this matter "on suspicion or news reports; we act only on legal proof."

The record contains proof on the point; but even if it did not, the wise rule was thus expressed by Lord Coleridge in *Lumley* v. *Gye* (2 El. & Bl. 266, quoted in IX Wigmore: Evidence section 2583n): "Judges are not necessarily to be ignorant in Court of what everybody else, and they themselves out of Court, are familiar with; nor was that unreal ignorance considered to be an attribute of the Bench in early and strict times."

In *Nankivil* v. *Omsk All Russian Government*, 237 N. Y. 150, 156, notice was taken that recent Russian history in considerable detail is a matter of common knowledge. In 15 Ruling Case Law: Title "Judicial Notice," section 28, it is stated that "Matters of religious history are deemed to be subjects of common knowledge and therefore of judicial notice," which is also said to be taken of "the general current of human affairs, which rest entirely upon acknowledged notoriety for their claims to judicial recognition (section 1).

Moreover, the constitutionality of Article 5-C is to be presumed, and, if it depends upon the domination of the Russian central church authorities by the Soviet state, the legislature is deemed to have found that as a fact, and the burden is cast upon those who are attacking the constitutionality to establish that the fact is otherwise. In *O'Gorman & Young* v. *Hartford Ins. Co.*, 282 U. S. 251, 257-8, it was said: "As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute." In *Powell* v. *Pennsylvania*, 127 U. S. 678, 685, the Court stated: "And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts." In *People* v. *Lochner*, 177 N. Y. 145, 169, it was stated in a concurring opinion by Vann, J., on a question of constitutionality: "Necessarily in considering the subject we may resort to such sources of information as were open to the legislature." Again in *Noyes* v. *Erie & Wyoming Farmers*

Co-op Corp., 281 N. Y. 187, 195, the rule was declared: "But a known state of facts warranting legislative action is presumed * * *." In *Szold* v. *Outlet Embroidery Supply Co.*, 274 N. Y. 271, 278, it was stated in an opinion, per Loughran, J., in considering an assertion of facts which would impair the constitutionality of a statute: "We think the assertion is without support in the ordinary data of human experience, but if we are not supposed to know this to be so, then the presumption is that the legislature inquired and found the need * * *."

In view of the statutory enactment in this state determining that the autonomous group with which plaintiff is affiliated is the successor to the American branch of the Russian Orthodox Church, entitled to the control and administration of its properties, we are required to assume that the legislature examined into the question and determined that the central church authorities in Moscow function in reality as a department of the Russian state. The majority opinion toward the end suggests that if and when the Russian Orthodox Church no longer exists in Russia, *or* "if and when the legislature of this state may make appropriate disposition of property within this state found to be subject to its control and disposition, our courts may take other action. Thus far we find no declaration by the legislature and no proof offered to this court that the trust purposes for which plaintiff holds the cathedral have been extinguished or terminated." This statement fails to consider that, under the cases above cited, it was not necessary for the legislature in enacting Article 5-C to enumerate specifically the facts conditioning its validity, but that the existence of such facts would be presumed. Among the facts which the legislature is deemed to have found are a Patriarch and synod in Moscow dominated, directed and controlled by a totalitarian atheistic regime. If it is to be decided that the trust purposes for which plaintiff holds the cathedral require that any Christian society shall submit to administrative control by such authority, it is difficult to conceive what more aggravated circumstances could exist that would call for legislative or court action to overrule the conclusion reached by the majority herein.

It is said that there have been instances in history where a church or sect has been subject to varying degrees of political control or domination without drawing in question its functional existence. It is probable that history has never known such refined techniques, whether based upon subtle psychology or propaganda or the ruthless use of brute force, for coercing body, mind and spirit as those which have been developed with the aid of modern science, and used so effectively by totalitarian countries in the present era. A venerable church, widely respected, can be transformed into a powerful engine for the exercise of such coercion and control. That objective could not be reached except by making use of ecclesiastical forms, but the fact that these are to some extent left undisturbed indicates only that by doing so the church can more effectively be used for political opportunism, and not that there is any real area of freedom for church functionaries. It has been the unmistakable purpose of the Soviet Government to prostitute historical churches to that end, and where highly placed clerics have been bent to the will of that government, *reason dictates* that their utterances should not be regarded as the official expression of their communions but as the voice of the Politburo.

The point is not whether the Soviet Government will succeed in annihilating all religion except worship of the Russian state; it is, rather, that our law does not require us to assist in the process, so far as churches in America are concerned, by sustaining the eviction of their communicants and compelling them to find other places of worship, unless they submit to administrative direction by top level church officials who would not be permitted to function, unless they consented to the use of their powers to promote the advancement of atheistic world communism. It is not believed that the purposes of the present regime have been substantially altered, as thus expressed in a statement by Josef Stalin in his conversation with members of the First American Trade Union Delegation September 9, 1927, as set forth at pages 345-346 of this record:

> "The Party cannot be neutral with regard to religion, and it conducts antireligious propaganda against any

> and all religious prejudices because it stands for science, while religious prejudices go against science, since every religion is something contrary to science. * * * The Party cannot be neutral with regard to the bearers of religious prejudices, with regard to the reactionary clergy, poisoning the minds of the toiling masses. Have we oppressed the reactionary clergy? Yes, we have oppressed them. The trouble is only that they are not yet fully liquidated. Antireligious propaganda is the means which must carry through to the end the work of liquidating the reactionary clergy."

Whatever this statement may signify in respect to science, it is an expression of uncompromising and ruthless hostility toward Christianity. The Roman emperors Nero and Trajan also persecuted the Christians, but they were not in the anomalous position of attempting to be at the same time in actual charge of the administration of the Christian Church.

The Orthodox Eastern or Greek Catholic Church in its origin, was affected to a greater degree by the civil power exerted through the Eastern Empire, than was true in the west. It appears to be true enough that the czars, professing Christians, like the Emperor Justinian before them, frequently ruled the Church in important aspects. On the other hand, there were periods when the civil power was weak, when the Russian Church became the chief permanent institution of the Russian nation, and the patriarch of Moscow stood out as the visible center of unity (W. F. Adeney, The Greek & Eastern Churches, Scribners, 1908, pp. 406-7).

The Church in the east never had the cohesion of the Roman Catholic Church, and after Justinian's empire disintegrated, the church-state relationships made the rising forces of nationalism tend to eliminate central authority, and to divide the Orthodox Eastern Church along nationalist lines. This is said to have resulted in the establishment of about seventeen autonomous Orthodox Eastern churches (see Columbia Encyclopedia, 1946 ed., tit. "Orthodox Eastern Church", p. 1314). The Russian Orthodox

Church itself was formed by breaking away from the patriarch of Constantinople, after he became subject to the "infidels"—to a lesser degree, however, than in Russia today—upon the fall of Constantinople to the Turks at the end of the Middle Ages in 1453. This, says a leading historian (Adeney, p. 392), had the immediate consequence of gaining ecclesiastical independence for the Russian Church, resulting in the election of the Metropolitan of Moscow by a council of Russian bishops instead of his being appointed by the Patriarch of Constantinople. There was no doctrinal schism. Even when express recognition finally was wrested from the enfeebled Patriarch in 1589, and the office of Patriarch of Moscow was set up, there was grave doubt among formalists concerning the power of the Patriarch of Constantinople to do this without the approval of an œcumenical council and, furthermore, there was no ceremony of investiture. The latter was withheld as a concession to the Byzantine Greeks, who were thus enabled to adhere to the view that the Russian Church was uncanonical and void (Janin: The Separated Eastern Churches, Sands & Co., London, 1933, pp. 94-5; W. F. Adeney, op. cit., p. 392, *seq.*) "But", continues the latter author, "beyond this accession of dignity the Patriarch of Moscow had acquired no more real power than had been secured already by the Metropolitan."

The autonomous Russian Church in America is following a similar course today. The headquarters has not been in Russia for 900 years, but was in Constantinople until the Patriarch of Constantinople fell into the hands of the Turks. That created a situation which was as intolerable for the churches in Russia as the autonomous group in America are finding it today, now that the Patriarch of Moscow has fallen into the power of modern infidels. Until then there was no Patriarch of Moscow, who was brought into being by this earlier historical parallel. The fiduciary principle, on which the outcome of this case depends, can hardly be so inelastic as to require that a Christian religious society must submit to the dictates of either militant atheism or militant Mohammedanism in order to continue to possess its property.

In the case of an established national church, it is inevitable that foreign branches will become autonomous where the mother country insists upon using it is an instrument of national policy. An illustration of judicial recognition that the tides of history are not to be confined by legal fictions, is found in the holding that the Episcopal Church in America ceased to be subject to control by the Archbishop of Canterbury after the American Revolution (*Schier* v. *Trinity Church*, 109 Mass. 1, 20; Zollman: American Civil Church Law, pp. 161-2), notwithstanding that the "establishment" of the Anglican Church in England involved no such absorption of the church into the state as exists in Russia, that the cultural and traditional backgrounds of the two countries were homogeneous, and that the beliefs and ecclesiastical practices of those two demoninations were almost identical.

An appeal to history tends to result in confirmation of the legal position of the autonomous Russian Church in America as successor to the branch of the Russian Orthodox Church on this continent, and in the conclusion that the Legislature has acted within the historical pattern of the Orthodox Eastern Church in accordance with which the church in Russia itself was established.

In these latter days there have been declarations by high ecclesiastics, before being arrested in communist countries, to disregard whatever they may afterward say. The human being cannot always forecast what he will say or do when subjected to extremes of physical or mental torture. Religious leaders have sometimes found it possible to be foresighted enough to delegate their authority in anticipation of such catastrophes. The Russian high church authorities in recent times endeavored to do so in event of dioceses cut off from Moscow by "military movements". The Patriarch and Holy Synod, while they still enjoyed some freedom of action, were not farsighted enough expressly to delegate power to branches of the Russian Orthodox Church beyond the reach of Soviet control, in anticipation of absorption of the central authority into the Russian state. There is indication in this record that Patriarch Tikhon, had he known what was to come, might have done

something of that kind. His hand appears to have been forced, however, and he died in 1925. There is no reason to believe that Patriarch Alexi could have been appointed or continue to hold office if he were not a willing tool of the Kremlin.

If express delegation of authority in advance is indispensable, it would appear to be a postulate of that principle, that if the central church authority in Russia had been prevented from functioning by German military occupation during World War II, the American and other foreign branches of the Russian Orthodox Church could not have operated outside of the orbit of the captured central authority, except as the latter had previously authorized them to do so. The German invaders, if Moscow had fallen, could, in the absence of that formality, have been masters of the Orthodox Russian Church throughout the world. If this be true, it behooves every church organization within striking range of Soviet power to discern the pattern of the future—whatever that may be—and to delegate authority accurately in anticipation of all contingencies, since otherwise under the majority ruling herein whoever seizes the central organs of authority will have *de jure* control of the functioning of the entire religious society wherever situated.

In ecclesiastical as well as in legal thinking, there is a well grounded professional instinct that lines of authority should be rendered explicit, but it seems to be a *reducio ad absurdum* to regard the absence of such anticipatory express delegations as a warrant of power for usurpers of ecclesiastical rule. It is sound legal doctrine to treat as null and void the words and acts of persons or officials who have been deprived of their freedom of action. Nor should the historical Russian Church in the United States be held to have disintegrated, for the reason that the voluntary direction and consent of the Patriarch and the Holy Synod in Moscow are no longer obtainable. Expressly delegated lines of authority are desirable, but if they be always essential, a church communion would be in a sorry plight if its high officials, failing to read the future correctly, neglected to delegate administrative power, or did

so in the wrong direction or to the wrong persons. Nice questions might arise, even then, of power to delegate power, and a vital church organism be strangled in legal technicalities.

The majority opinion states that we have misunderstood the controversy between these parties; the record shows that we have not misunderstood it, that there is a fundamental matter in difference, and of a type that is not likely to be settled until it is settled right.

The judgment appealed from should be reversed with costs, and judgment entered awarding to the plaintiff possession of the real property described in the complaint, to be held by it subject to its acts of incorporation, by-laws and the statutes, regulations and usages of the Russian Church in America described in Article 5-C of the Religious Corporations Law.

DORE, J., concurs.

EXHIBIT D

Opinion. SUPREME COURT. TRIAL TERM—PART X.

By MR. JUSTICE BOTEIN. *St. Nicholas Cathedral of the Russian Orthodox Church in N. Y. v. Fedchenoff*—In 1925 the Appellate Division of this department held that one John S. Kedrovsky was the accredited Archbishop of the North American Diocese of the Russian Orthodox Church and as such entitled to occupy the Cathedral of Saint Nicholas in New York (*Kedrovsky* v. *Rojdesvensky*, 214 App. Div. 483). Its determination was affirmed without opinion by the Court of Appeals (242 N. Y., 547).

Kedrovsky had sought to prevent the defendant Rojdesvensky, who likewise claimed a valid appointment as Archbishop of the North American Diocese, from occupying the cathedral. The complaint asserted that the defendants were not the archbishop and dean of the church, and that by their occupancy they were diverting the property of the church from the trust to which it was subject, that is, occupancy by the accredited archbishop and dean. The complaint took the form of an action for the enforcement

of the trust upon the real property occupied by the defendants.

In arriving at this decision the Appellate Division found that none of the bodies purporting to recognize Rojdesvensky as an archbishop was shown to have had any authority to appoint an archbishop. The court, on the other hand, found that Kedrovsky was appointed by the Holy Synod and that this body derived its powers to make a valid appointment from a legally convoked Sobor, or ecumenical convention of the church, held in Moscow in 1923. "As to Kedrovsky's authorizations from the Holy Synod there is no dispute whatsoever. The Holy Synod has authority to appoint an archbishop for North America and a delegate of the Holy Synod" (p. 488).

The court therefore concluded (p. 489): "To set aside the actions of the second Sobor under these conditions in favor of the shadowy claim of the defendant Rojdesvensky, on the theory that the doctrinal necessities of the Russian Church require it, would put a civil tribunal of New York in ascendency over the ecclesiastical authority in the decision of a purely ecclesiastical question with which it can have no concern."

In making this determination, the courts were applying well-defined principles enunciated in the leading cases of *Watson* v. *Jones* (13 Wall., 679), and *Trustees of Presbytery* v. *Westminster Church* (222 N. Y., 305). Each of these cases, as well as the instant one, grew out of a schism "which has divided the congregation and its officers, and the presbytery and synod, and which appeals to the courts to determine the right to use the property so acquired" (*Watson* v. *Jones, supra,* p. 726). Both leading cases, as well as the instant one, involved the third of the three classes of cases discussed in *Watson* v. *Jones.* "It is the case of property acquired in any of the usual modes for the general use of a religious congregation which is itself part of a large and general organization of some religious denomination, with which it is more or less intimately connected by religious views and ecclesiastical government" (p. 726).

In laying down the rule governing such cases, the Supreme Court, in *Watson* v. *Jones*, avowedly departed from the doctrine of the English courts. It held "In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a prepondering weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them" (p. 727). * * * It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for" (p. 729).

In *Trustees of Presbytery* v. *Westminster Church* (*supra*) the Court of Appeals rejected "the claim of defendants in substance that they will be obeying all the requirements of denomination uses if they devote the property in their custody to the observance and propagation of what may be regarded as the general, fundamental principles of the Presbyterian faith, although they secede from the church organization at large with which they have been affiliated and utterly refuse to obey its government or be bound by its rules and regulations" (p. 313). The court went on to say: "Expressed in another form, defendants' claim is that they can utilize the church property of which they hold title for the maintenance and support of an 'independent' Presbyterian church—a church free and independent of any government or control of the Church at large. * * * We do not accept this view."

The opinion rendered in *Kedrovsky* v. *Rojdesvensky*, over twenty years ago, while not citing these authorities, groups itself logically in the pattern they set. It simply directed that occupancy of a cathedral built in 1903, for a diocese established in 1793, with funds furnished in large

part by the Russian Orthodox Church in Russia, should be given to an archbishop duly appointed by that church—not to an archbishop deriving his authority from a convention held in Detroit in 1924, which, as the court put it, "purported to secede from the Russian Church and to make Rojdesvensky Archbishop of an independent church" (p. 487).

Opinion.

It is in this setting that we must consider the facts that have transpired in the ensuing twenty-odd years and which have led to the institution of this lawsuit.

Following final court determination of his right to occupancy, Kedrovsky entered into possession of the cathedral. The plaintiff corporation, which was incorporated by special act of the Legislature in 1925 and claims legal title to the cathedral, permitted him to remain in possession until his death in 1934. The plaintiff corporation likewise made no effort to oust Kedrovsky's son, Nicholas J. Kedroff, who claimed to have succeeded him as ruling archbishop, and he remained in possession until his death in 1944. During this period the breach still existed between those who acknowledged the spiritual leadership of the Patriarch of Moscow, but who asserted and maintained autonomy in all other regards, and those who subscribed to the administrative as well as spiritual leadership of the Patriarch and Holy Synod. The head of the first group is Metropolitan Theophilus; the latter group is headed by the defendant Metropolitan Benjamin.

This is an action in ejectment, tried before the court without a jury. The plaintiff, claiming to be the owner in fee, seeks immediate possession of the cathedral, which it asserts is being unlawfully withheld from it by the two defendants. We need only determine the rights of one defendant, Metropolitan Benjamin, as the other defendant concededly derives whatever rights he might possess through the former.

The defendant, by way of separate defenses, alleges that as accredited Archbishop of the North American Diocese he is entitled to possess, occupy and use the premises, that

the plaintiff has no authority to bring this action, and that the action is barred by the statute of limitations and by the plaintiff's laches. At the conclusion of the trial the defendant also urged that the plaintiff's title to the property involved is defective and that it had failed to prove the necessary ingredients of an action in ejectment.

Ejectment is a proper form of action for the determination of the right of possession of property held or claimed by a religious corporation (*Westminster Presbyterian Church* v. *Trustees of Presbytery*, 170 App. Div., 439). The plaintiff in this case holds title to the cathedral for the benefit of the North American Diocese and of the ecclesiastical dignitaries entitled to possession (*Kedrovsky* v. *Rojdesvensky, supra*). It, by its trustees or officers, may bring an action in ejectment when, as claimed here, the persons entitled to possession are alleged to have been unlawfully ousted and refused reentry. "The trustees obviously hold possession for the use of the persons who by the constitution, usages, and laws of the Presbyterian body, are entitled to that use * * *. They have no personal ownership or right beyond this, and are subject in their official relations to the property, to the control of the session of the church" (*Watson* v. *Jones, supra*, p. 720). * * * "They (the defendants) should be compelled to recognize these rights and permit those who are the real beneficiaries of the trust held by them to enjoy the uses, to protect which that trust was created" (p. 721).

The one issue which looms large in this case is whether, as asserted by the plaintiff, Metropolitan Theophilus is the accredited head of the church in North America, or whether, as claimed by the defendant Metropolitan Benjamin, he is that head.

The facts in this case parallel, with a fidelity seldom encountered in litigation, the facts in the *Kedrovsky* case. The Holy Synod was there held to have had the authority to appoint the ruling archbishop and there was no dispute as to Kedrovsky's authorization from that church body. Likewise, there is no dispute in this case that the defendant Metropolitan Benjamin was duly appointed by the Patriarch and Holy Synod as ruling archbishop in 1934, following Kedrovsky's death. It was also held that the group

which "purported to secede from the Russian Church and make Rojdesvensky Archbishop of an independent church" had no authority to appoint the ruling archbishop. It is this same group which now purports to designate Metropolitan Theophilus as ruling archbishop and the plaintiff corporation, by virtue of such designation, seeks judgment which in effect would secure possession of the cathedral for Metropolitan Theophilus.

The plaintiff has, at least inferentially, assailed the soundness of the findings made by the Appellate Division in the *Kedrovsky* case as to the canonical validity of Kedrovsky's appointment and the invalidity of Rojdesvensky's purported appointment, and asks this court, in substance, to distill different findings from substantially the same evidence that was submitted in the earlier case. This, of course, may not be done, and the inexorable parallel between the *Kedrovsky* case and the instant case would seem immediately to require judgment for the defendant. However, intervening legislation must first be considered.

Opinion.

In 1945 the new article 5-c of the Religious Corporations Law relating to Russian Orthodox churches was enacted. This statute constitutes a legislative recognition of the historical fact that since 1924 a representative group of Russian Orthodox churches, formerly subject to heirarchial administrative and spiritual control of the Sacred Synod, have asserted their administrative autonomy and have organized an independent Russian church in America. Accordingly, the statute defines the "Russian Church in America" and a "Russian Orthodox Church" (section 105) provides for the incorporation of a Russian Orthodox Church (section 106), the management of its affairs and property (section 107) and reincorporation of existing incorporated Russian churches as newly incorporated Russian Orthodox Churches (section 108).

There is nothing in the statute which indicates a legislative intent to accomplish a transfer of property of all Russian Orthodox Churches in this country to the use of the newly recognized "Russian Church in America." There

are no legislative findings accompanying article 5-c which might be expected were that the Legislature's intent. It contains none of the bluntness and direct statement of an expropriation statute such as the Act of Congress of 1887 recited in *Mormon Church* v. *United States* (136 U. S. 1).

It is urged that the statute inferentially provides for the dedication and use of the property of *all Russian* Orthodox Churches for the benefit of and at the direction of the Russian Church in America. While the statute so states (section 107) it is limited by the definition in section 105 preceding which defines a Russian Orthodox church as one "founded and established for the purpose and with the intent of adhering to, and being subject to the jurisdiction of, the Russian Church in America." When St. Nicholas Cathedral was "founded and established" there could have been neither "purpose" nor "intent" to adhere and to be subject to the "Russian Church in America," for that church was not then factually in existence.

All that the new article 5-c accomplished was to provide a framework for jurisdiction and authority over churches and their property in accordance with the rules, regulations and usages of the Russian Church in America (section 107), applicable only to Russian Orthodox churches which might thereafter be organized (section 106) or which, having theretofore been incorporated, should thereafter be reincorporated (section 108). Since St. Nicholas Cathedral falls within neither of these categories, it follows that its use is not subject to the direction of the Russian Church in America.

This conclusion as to the scope of article 5-c of the Religious Corporations Law makes it unnecessary to consider the question of the constitutionality of the statute as violative of "due process" in effecting a transfer of property.

Judgment is accordingly directed for the defendants. Suggestions as to the form and subject matter of the judgment will be entertained upon settlement of the judgment. Settle judgment.

New York Law Journal, Thursday, February 19, 1948.

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Supreme Court of the United States

October Term, ~~1950~~ 51
No. 717 [redacted] 3

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA,

Plaintiff-Appellee,

against

JOHN KEDROFF and BENJAMIN FEDCHENKOFF, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church,

Defendants-Appellants.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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Supreme Court of the United States

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No. 717

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APPELLANTS' BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

1. *Kedrovsky* v. *Rojdestvensky* (214 App. Div. 483; affirm. 242 N. Y. 547) held that Saint Nicholas Cathedral was not part of the metropolitan district, but was part of the American Archdiocese and was subject to the jurisdiction of the central church authorities. The civil power may not, without violating the guarantees of religious liberty, compel such a cathedral to renounce its canonical allegiance to the Patriarch and to subject it to the jurisdiction of a rival church.

2. The basic error of appellee's position is emphasized by its contention, also made by the majority in the Court of Appeals (302 N. Y. 29, 22), that the statute subjects to the jurisdiction of the metropolitan district and its elected archbishop *only* those patriarchal churches which were established *before* 1924, leaving the churches established

after 1924 free to adhere to the Patriarch. No rational reason is or can be advanced for differentiating Russian churches established before 1924 from those established after that date. Since Article 5-C deals solely with *incorporated* Russian churches, the proferred constitutional justification for the statute then comes to this: we are to "presume" that the legislature made a "finding" that the Patriarchal Church is not "free", is not a "true" religious body, is a "tool" of the Soviet Government; consequently the legislature suppressed only those *incorporated* patriarchal churches which were established *before* 1924!

The motion to dismiss or affirm should be denied.

Respectfully submitted,

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Supreme Court of the United States

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~~No. 44~~ 3

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA,

Appellee,

against

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Appellants.

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49

INDEX

	PAGE
STATEMENT OF JURISDICTION	1
THE OPINIONS BELOW	2
THE STATUTE INVOLVED	2
STATEMENT OF THE CASE	4
Nature of the Action	4
The Russian Orthodox Church	5
The American Archdiocese	5
The Government of the Archdiocese	6
Relation Between the American Archdiocese and the Church at Large	6
St. Nicholas Cathedral	7
The Metropolitan District	10
SPECIFICATION OF ERRORS	13
THE CONSTITUTIONAL ISSUES PRESENTED	13
SUMMARY OF ARGUMENT OF POINT I	14
POINT I—The statute, as construed and applied by the Court of Appeals, constitutes an abridgment of freedom of religion guaranteed by the First Amendment to the United States Constitution, made applicable to the states by the Fourteenth	15
A—The First Amendment withdraws from the civil power the entire field of religion and particularly the internal government of all religious societies	15

PAGE

B—The statute, by compelling the transfer of St. Nicholas Cathedral from the jurisdiction of the Patriarch to that of a locally elected archbishop and by compelling the ouster from possession of the Cathedral, required by canon law, by the patriarchal archbishop, violates the constitutional guarantee of religious liberty ..... 22.

C—The proffered justification for the statute—the "determinative" finding that the Patriarchate is not "free"—is inadmissible 26

1—The finding that the Patriarchate is not "free" is arbitrary, without evidentiary support and contrary to the evidence and findings of the triers of the facts 27

2—The finding that the Patriarchate is not "free" may not be made by judicial notice 28

3—There was no demand for a "pledge of loyalty" by the clergy abroad to the Soviet State 30

4—The alleged "pledge of loyalty" by Patriarch Sergius to the Soviet State in 1927 does not show that the Patriarchate is not "free" 30

5—The finding that the Patriarchate is not "free" may not be read into the statute by presumption 33

6—The legislature did not find that the Patriarchate is not "free" and the "presumption" that it did is wholly arbitrary and fictional 34

PAGE

D—The "presumed" finding that the Patriarchate is not "free" furnishes no constitutional justification for the suppression of that Church 36

E—Assuming the clear and present danger rule is applicable, the statute fails to meet the test of this rule 39

POINT II—The statute, as construed and applied by the Court of Appeals, is a taking of property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution 41

POINT III—The retroactive application of the statute to this action, which was already pending when the statute was passed, violates the due process clause of the Fourteenth Amendment 42

POINT IV—The direction by the Court of Appeals that the trial court exercise its "discretion" to determine whether appellant Benjamin is the "proper trustee" or "proper person" to occupy St. Nicholas Cathedral, violates his religious freedom guaranteed by the First and Fourteenth Amendments.. 42

(a) The use of the *Kedrovsky* record as a basis of the decision against appellants, violates due process 45

POINT V—The failure and refusal of the Court of Appeals to rule on the merits of the defense of limitations of appellant Benjamin, while directing final judgment against him, is a denial of due process of law in violation of the Fourteenth Amendment to the United States Constitution 46

CONCLUSION 49

PAGE

Appendix A—Article 5-C of Religious Corporations Law of the State of New York 2, 50

Appendix B—Additional authorities as to the status of the Patriarchal Church in the Soviet Union 54

Table of Cases Cited

Abrams v. United States, 250 U. S. 616 39
American Communications Assn. v. Douds, 339 U. S. 382 ..... 36, 37

Backus v. Fort Street Union Depot, 169 U. S. 557 43
Bridges v. California, 314 U. S. 252 39
Brinkerhoff v. Hill, 281 U. S. 673 43
Busey v. District of Columbia, 138 Fed. (2) 592 ..... 17, 34

Cantwell v. Connecticut, 310 U. S. 296 ..... 19, 20, 22
Chicago B. & O. R. R. Co. v. Chicago, 166 U. S. 226 43
Cooke v. U. S., 267 U. S. 517 49

Davis v. Beason, 133 U. S. 333 26
Debs v. United States, 249 U. S. 211 39
Dennis v. U. S., 341 U. S. 494 39
Drozda v. Bossos, 260 App. Div. 408 24
Ettor v. City of Tacoma, 228 U. S. 148 ..... 41, 42
Everson v. Board of Education, 330 U. S. 1 ..... 15, 17, 18

Federal Communications Commission v. WJR, 337 U. S. 265 49
Feiner v. United States, 340 U. S. 315 27
Fisk v. Kansas, 274 U. S. 380 39
Flournoy v. Wiener, 321 U. S. 253 1
Follett v. McCormick, 321 U. S. 573 ..... 17, 19
Forbes Pioneer Boat Line v. Everglades Drainage District, 258 U. S. 338 42
Frohwerk v. United States, 249 U. S. 204 39

PAGE

Hartzell v. U. S., 322 U. S. 680 39

Jones v. Opelelka, 319 U. S. 103 19

Kedrovsky v. Archbishop and Consistory of the Russian Catholic Church, 249 N. Y. 75 44
Kedrovsky v. Rojdesvensky, 214 App. Div. 483; aff'd 242 N. Y. 547 ..... 8, 10, 13, 45, 46
Kunz v. New York, 340 U. S. 290 20

Lovell v. Griffin, 303 U. S. 444 20

Marsh v. Alabama, 326 U. S. 501 ..... 17, 20
Martin v. Struthers, 319 U. S. 141 19
McCollum v. Board of Education, 333 U. S. 203 ..15, 18, 20
Meyers v. Nebraska, 262 U. S. 390 19
Morgan v. United States, 298 U. S. 468 49
Murdock v. Pennsylvania, 319 U. S. 105 ..... 17, 19

Niemotko v. Maryland, 340 U. S. 268 ..... 20, 27

Ochoa v. Hernandez, 230 U. S. 139 41

Palko v. Connecticut, 302 U. S. 319 17
Pierce v. Society of Sisters, 268 U. S. 510 19
Pierce v. United States, 252 U. S. 239 39
Powell v. Alabama, 287 U. S. 45 49
Prince v. Massachusetts, 321 U. S. 158 ..... 17, 20, 26
Prudential Ins. Co. v. Cheek, 259 U. S. 530 21

Reynolds v. United States, 98 U. S. 145 26
Roberts v. Anderson, 66 Fed. (2d) 874 49

St. Nicholas Cathedral, etc. v. Kedroff, et al., 302 N. Y. 1; 276 App. Div. 309; 192 Misc. 327 2
Schaefer v. United States, 251 U. S. 466 39
Schenck v. United States, 249 U. S. 47 39
Shelley v. Kraemer, 334 U. S. 1 43
Stromberg v. California, 283 U. S. 359 39

PAGE

Taylor v. Mississippi, 319 U. S. 583 39
Thomas v. Collins, 323 U. S. 516 .....17, 34
Thornhill v. Alabama, 310 U. S. 88 33
Trustees of Presbytery v. Westminster Church, 222 N. Y. 305 .....7, 43
Tucker v. Texas, 326 U. S. 517 20

United States v. Carlene Products Co., 304 U. S. 144 17

Watson v. Jones, 13 Wall. 679 .....7, 10, 22, 27, 43
Watts v. Indiana, 338 U. S. 49 27
West Virginia School Board of Education v. Barnette, 319 U. S. 624 .....17, 20, 33
Whitney v. California, 274 U. S. 357 39

Constitution and Statutes

Constitution of the United States:
First and Fourteenth Amendments 15, 41, 42, 46

Constitution of the State of New York:
Art. 6, Sec. 7 27

Title 28, United States Code:
Secs. 1257, 2103 1

Religious Corporations Law of the State of New York:
Art. 5-C 2, 50
Art XV and Sec. 15 of Art. 2 34

Civil Practice Act of the State of New York:
Sec. 605 27
Secs. 24, 34 47

Works of Reference

		PAGE
Anderson:	People, Church and State in Modern Russia	29, 56
Bolshakoff:	The Christian Church and the Soviet State	29, 55, 56
Bryce:	The American Commonwealth	16
Casey:	Religion in Russia	29, 55
Curtiss:	Church and State in Russia	32
Dunning:	History of Political Theories	31
Encyclopedia Britannica:	Vol. 5, p. 673	24
Fortescue:	The Orthodox Eastern Church	32
Gettell:	History of Political Thought	16, 31
House Document #754:	Religion in the Soviet Union	29, 54
Italy Today:	(1929)	32
McGiffert:	History of Christian Thought, Vol. II	16
Moehlman:	The Wall of Separation Between Church and State	15
Morgan:	Judicial Notice—57 Harvard Law Review 269	29
Pares:	Russia and the Peace	32
Phillips:	The Church in France, a Study Revival	56, 57
Rommen:	The State in Catholic Thought	16, 31, 32
Russell:	History of Western Philosophy	38

		PAGE
Smith:	My Three Years in Moscow	29
Stokes:	Church and State in the United States, Vols. I and III 16, 17	
Timasheff:	The Great Retreat 29, 55	
Walker:	History of Christian Church	57
Wigmore:	Evidence, Vol. IX, Secs. 2571, 2565	29

Supreme Court of the United States

October Term, 1951

No. 44

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA,

Appellee,

against

JOHN KEDROFF and BENJAMIN FEDCHENKOFF, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church,

Appellants.

APPELLANTS' BRIEF

Statement of Jurisdiction

This is an appeal from a judgment of the Court of Appeals of the State of New York which sustained the validity of Article 5-C of the Religious Corporations Law of that state against the claim that, as construed and applied, it was repugnant to the First and Fourteenth Amendments to the United States Constitution. This Court has jurisdiction of the appeal under Title 28, U. S. C., sec. 1257, and of the non-appealable issues, set forth in the assignment of errors, under sec. 2103 of Title 28 (*Flournoy* v. *Wiener*, 321 U. S. 253, 263; *Prudential Insurance Co.* v. *Check*, 259 U. S. 530, 547). The judgment was rendered on November 30, 1950. A timely motion for reargument was made on January 12, 1951 and was denied by the state court on March 9, 1951 (298). The appeal was allowed on April 11, 1951 and this Court noted probable jurisdiction on June 4, 1951 (299, 304).

The Opinions Below

The Court of Appeals reversed the judgments of the lower courts in favor of appellants and directed judgment in favor of appellee by a vote of four to three. One majority opinion was written by Judge Conway in which Judges Lewis, Dye and Froessel concurred. A concurring opinion was written by Judge Froessel in which Judges Conway, Lewis and Dye concurred. There was a dissenting opinion by Judge Desmond in which Chief Judge Loughran and Judge Fuld concurred. They are reported in 302 N. Y. 1.

The Appellate Division ruled in favor of appellants by a three to two vote. The majority and minority opinions are reported in 276 App. Div. 309.

The opinion of the Trial Court is reported in 192 Misc. 327.

The Statute Involved

The statute is Article 5-C of the Religious Corporations Law of the State of New York (Laws of 1945, ch. 693, as amended by Laws of 1948, ch. 711, Vol. 50, McKinney's Consolidated Laws of New York). Its full text is set forth in Appendix A annexed hereto. In substance:

> (a) It defines a group of churches as a separate and autonomous religious body called the "Russian Church in America". Until April 1924, these religious organizations had belonged to a larger group constituting, under successive names, the American Diocese of the Russian Orthodox Church, and had theretofore been subject to the jurisdiction of the Most Sacred Governing Synod in Moscow and later the Patriarch of Moscow. In April 1924, at a convention in Detroit, this group of churches constituted themselves an "administratively autonomous metropolitan district", and thus seceded from the American Diocese and from the Russian Orthodox Church to which the American Diocese remained subject (sec. 105).

(b) It defines a "Russian Orthodox Church" as a church, "founded and established for the purpose and with the intent of adhering to, and being subject to the administrative jurisdiction of said mission, diocese or autonomous metropolitan district *hereinabove defined as the Russian Church in America*" (sec. 105).

(c) It provides for the government of *incorporated* Russian Orthodox Churches (sec. 107). It directs that "every" Russian Orthodox church in the State of New York, "whether incorporated before or after the creation of said autonomous metropolitan district * * * shall *recognize and be and remain subject to the jurisdiction and authority of the * * * archbishop or other hierarch or primate*" and other "*governing bodies and authorities of the Russian Church in America*" (sec. 107(1)). And it gives to the trustees of every such Russian Orthodox church "the custody and control" of all its temporalities and property, and requires them to "administer" the same "in accordance with the * * * rules and statutes * * * of the Russian Church in America" (sec. 107(3)). (Italics added.)

By force of this statute, as construed and applied by the Court of Appeals, appellant Benjamin, who was the Archbishop of the American Archdiocese of the Russian Orthodox Church, by appointment of the Patriarch, the Chief Authority of the Russian Church, and who was occupying St. Nicholas Cathedral of that Church, as such Archbishop, under the canon law of that Church, was ousted from such possession, and occupancy of the Cathedral was awarded to appellee.

Statement of the Case

Nature of the Action

This is a suit in ejectment (1).[1] Appellee, a New York corporation, holds the nominal legal title to St. Nicholas Cathedral in the City of New York. It represents a group of Russian churches, who, in 1924, at a convention in Detroit, purported to secede from the Russian Church at large and organized themselves into an "autonomous metropolitan district" and elected their own archbishop. The statute refers to this group as the "Russian Church in America" (sec. 105). Appellant Benjamin was the Archbishop of the American Archdiocese of the Russian Orthodox Church, by virtue of his appointment to that office by the Patriarch, and he asserted the defense that, as such accredited Archbishop, under the canon law of the Russian Church, he had the exclusive right to occupy the Cathedral (3-4).

Notwithstanding this defense, the Court of Appeals: (1) held that the statute was "conclusive" (302 N. Y. at 21, 33) and that its "mandate" required the ouster from the Cathedral of appellant Benjamin, the appointed archbishop; (2) ruled that, in the absence of the statute, the judgment in favor of appellants should be reversed with a direction that the Trial Court exercise its "discretion" to determine whether the archbishop appointed by the Patriarch or the one elected by the metropolitan district was the "proper trustee" or "proper person" to "administer" the Cathedral (302 N. Y. at 24); and (3) refused, while directing final judgment against him, to rule on the merits of appellant Benjamin's defense of the statute of limitations (302 N. Y. at 21).

The extent to which the statute invades and destroys religious liberty can more readily be determined by examining the nature and structure of the Russian Church and the special and unique status of St. Nicholas Cathedral in that church.

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[1] Unless otherwise indicated numbers in parentheses refer to pages of the printed case on appeal.

The Russian Orthodox Church

The Russian Orthodox Greek Catholic Church, hereafter referred to as the Russian Orthodox Church, is an autocephalous member of that group or family of Greek Catholic or Eastern Orthodox churches which were formally separated by the Great Schism of 1054 from the Western or Latin or Roman Catholic Church. It is an hierarchal church and the supreme authority therein is vested in a Patriarch. He in turn derives his authority from Sobors or general conventions of the Church (10-11, 163).

From the time of Peter, no Sobors were permitted by the Czars (89). Peter abolished the office of Patriarch and vested supreme authority in a Sacred or Holy Synod, of which, his procurator, a lay functionary, was the chief official (88-9). In 1917-18 the first Sobor since Peter's time was held in Moscow and that body restored the authority of the Patriarchate (10-11, 21). There was a brief interregnum during the early years of the Russian Revolution, but by 1927, the Patriarchal Church was re-established (107, 164). The last Sobor was held in 1945 and the present Patriarch was then elected (164, 107-8). The canonical validity of this Sobor and the Patriarch's election is not questioned (31, 244, 246) and he is named in the prayers of the local churches (31). The Patriarch is in full communion with the Eastern Churches (107-108, 37).

The American Archdiocese

The Russian Church first established itself on this continent at the end of the 18th century in the Aleutian Islands and Alaska at a time when these territories were part of the Russian Empire. When Alaska was ceded to this country, the authority of the Holy Synod over the Diocese of Alaska remained undisturbed. Thereafter, the church established a number of communities in this country and Canada (7, 11-12).

At first the Church here was called a Mission, then a Diocese, then an Archdiocese. The official name of the Archdiocese is "Archdiocese of the Aleutian Islands and of North America" (7, 236). It was a constituent part of the Russian Church at large (21, 164).

The Government of the Archdiocese

At first, the Church on this continent was governed directly by the Holy Synod (12), then through its agent, the Archbishop, who was appointed by the Synod (12-13, 15) answerable exclusively to it and subject to suspension, removal, transfer or replacement at the pleasure of the Synod (15-16, 164).

Under Russian Church law, which remains unaffected by any changes in temporal power, the Archbishop of the American Archdiocese is not *elected* by the local churches or clergy; they have no power to do so; he is appointed only by the Supreme Authorities of the Church at large (20, 22, 25, 135-6). Thus, the enactments of the Sobor of 1917-18, which had "indisputable canonicity and validity" (302 N. Y. at 6), declare that "Bishops to the foreign missions shall be appointed by the Sacred Synod" (20). The American Diocese was and is a foreign mission (128). In point of fact, all the Archbishops who served here were in each instance *appointed* by the Supreme Authorities (16). Indeed, such appointments were, prior to 1917, by ukase of the Czar (89). The Diocese was governed not by the local churches or clergy but by the Archbishop, and he was answerable not to them, but to the Supreme Authorities who appointed him (15-16).

Relation Between the American Archdiocese and The Church at Large

An Orthodox Church is not an aggregate or collection of separate or discrete parts, of parishes and dioceses, which are free to federate or separate at pleasure. An Orthodox Church is an indivisible whole. Indeed, it has

no parts. It is a unity and, by hypothesis, no diocese or parish may of its own will leave the Church or consider itself a part of the Church and live "autonomously", without breaking the unity, the indivisibility, of the whole. There is and can be only one Russian Orthodox Church.

Canon law does not permit secession or fission in the church under this or that set of circumstances, for this or that reason; there is an absolute bar to such conduct (165). And those who by assertion of their own power undertake to secede or to be "autonomous" or "self-governing", cut themselves off from the church and all rights to its property (*Watson* v. *Jones*, 13 Wall. 679; *Trustees of Presbytery* v. *Westminster Church*, 222 N. Y. 305).

Saint Nicholas Cathedral

This Cathedral was built about 1903 with money supplied by the Church in Russia and the Russian government, amounting to about $150,000. They contributed further substantial sums for its maintenance and upkeep (164, 14). "Some" money was raised locally (13).[2]

In 1905, the Cathedral was consecrated as the See of the American Diocese and the official residence, place of worship and headquarters of the Archbishop (164-5, 166,

[2] Title to the Cathedral was taken in the name of a New York corporation of which the Russian Ambassador and the Consul General of New York were the sole trustees (71-2, 229). That corporation, in 1916, transferred the deed to Archbishop Evdokim, who, in 1917, before he left for Russia, retransferred the deed to the grantor which, in 1925, without any consideration (160), gave the "title" to appellee (71-2, 73, 74-5, 204-6). The locus of the title is irrelevant. The right to occupy the Cathedral stems from canon law and not from the holder of the "title" who holds it subject to that law (*Watson* v. *Jones*, 13 Wall. at 720-2). Just as Archbishop Evdokim could not have been ousted by appellee's grantor, so his successor, Metropolitan Benjamin, may not be ousted by appellee, unless the statute may constitutionally so direct.

13, 17), and in the words of Bishop Leonte, appellee's witness, it "started as a Cathedral of Russia" (8).

The right of the duly accredited Archbishop of the American Archdiocese, appointed by the Supreme Church Authorities in Russia, under the canon law of the Russian Church, as an attribute of his Episcopal office, to occupy and use Saint Nicholas Cathedral as his residence, as a place of worship, and as the seat of his government of the Archdiocese, has never been questioned. Even the majority acknowledge as much (302 N. Y. at 5-6).

The testimony of the witnesses is unanimous on that point (17, 164-5, 136). All the appointed archbishops have so occupied it (16-17). Occupancy of the Cathedral by any one other than the appointed archbishop would violate the canon law of the church (17, 165). Appellee Metropolitan Benjamin is the accredited Archbishop by virtue of his appointment to that office by the Patriarch (166, 127, 226). He has been occupying the Cathedral as such Archbishop since 1945 (136-7).

In *Kedrovsky* v. *Rojdesvensky*, 214 App. Div. 483, aff'd 242 N. Y. 547, which, in principle, is identical with the case at bar and, apart from the statute, is decisive of the case, it was held that, under the canon law of the Russian Church, Saint Nicholas Cathedral is held in trust for the exclusive use of the archbishop *appointed* by the Chief Authorities, and the Court awarded the Cathedral to such appointee against the claim of the archbishop *elected* by the metropolitan district.[3]

Notwithstanding the above, the majority say that the Cathedral was "dedicated to the use of all the members

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[3] The majority's attempt to emasculate this case (302 N. Y. at 12-13) must fail. Both parties there relied on the undisputed rule of canon law that the appointed archbishop is the *ex-officio* beneficiary of the Cathedral trust, and each claimed to be such appointee. Rojdesvensky's claim on the ground of appointment was rejected as a matter of fact. His claim on the ground of local election was rejected as a matter of canon law.

of the diocese" or was "dedicated to use of members of a parish and of a diocese (302 N. Y. at 4, 34). That is an *ad hoc* assertion which serves the theory[4] of the majority but is without any evidence to support it, is wholly arbitrary and is refuted by their own acknowledgment that the edifice was consecrated as a Cathedral. It ignores the interlocking status and relationship of the ruling archbishop of a diocese and its cathedral under the canon law, usages and discipline of all hierarchical churches. A cathedral in such a church is by definition the official residence, administrative headquarters and place of worship of the canonical archbishop; and its consecration as a cathedral means its dedication to such use and occupancy. By its baseless finding the majority convert the Russian Church from an hierarchal to a congregational body. Whatever undefined rights the faithful may have in the Cathedral, they are subordinate to the rights of the appointed archbishop and cannot include the right to oust him, because the Russian is not a congregational Church.[5]

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[4] The theory is in substance this: The members of the diocese are the "beneficiaries" of the Cathedral and the archbishop is its "trustee". By virtue of their supervisory power over "trustees", the legislature or the courts may "select" the "trustee" who will "more faithfully administer" the Cathedral for its beneficiaries (302 N. Y. at 22, 24). But, if we are to use terms inapposite here, the appointed archbishop is the beneficiary, not the trustee, and, since his occupancy of the Cathedral is required by canon law, the civil authority has no supervisory power over such an exercise of religion. An archbishop may not be barred from exercising his religion by calling him a "trustee".

[5] The status and relationship of Metropolitan Benjamin and Saint Nicholas Cathedral under the Patriarch are, for example, similar to the status and relationship of Cardinal Spellman (as Archbishop) and St. Patrick's Cathedral under the Pope, for similar reasons of canon law, usage and discipline, and the civil power has no more right to oust Metropolitan Benjamin from St. Nicholas Cathedral than it has to oust Cardinal Spellman (as Archbishop) from St. Patrick's Cathedral.

The Metropolitan District

In 1924, a "number" (24) of Russian churches [6] met in a convention in Detroit and declared themselves "temporarily" to be "a self-governed Church • • • governed by its own elected Archbishop" and elected Platon (Rojdesvensky) as their Archbishop (187-9).[7]

This "self-governed Church" is the "autonomous metropolitan district" which the statute calls the "Russian Church in America" (sec. 105). In 1934, Metropolitan Theophilus was elected head of the district to succeed Platon who had died in the meantime (25, 28). In 1936, the district subjected itself to the supreme authority of a Synod of Bishops, domiciled in Karlovitz, Yugoslavia, calling themselves the "Russian Church Abroad", which purported to act as a rival to the Patriarchal Church outside Russia (32-4, 238, 240). The district pledged "loyalty" to this Synod of Bishops (151-2, 243-4) which first sought the restoration of the Czar, then joined its fortunes to those of Hitler (144, 145-6, 33-4) and, with the liberation of Yugoslavia, followed him back to Germany (143-4, 32). The district continued under the authority of this Synod while Hitler was in control of Yugoslavia and, when the "Russian Church Abroad" had ceased to exist altogether (147, 243-4), withdrew from that organization in 1946 and

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[6] According to the *Kedrovsky* record, 160 of a total of 190 churches attended the Detroit convention. A number voted against autonomy (187-8). In 1945, the district claimed 358 churches (215) and, in 1948, only 250 churches (159), revealing a substantial split. The Patriarchate claimed that 50 churches adhered to it (130) and the district acknowledged that 13 did so (215).

[7] The majority rely on the self-serving speeches at Detroit (302 N. Y. at 11-12). The nub of the matter was stated by one speaker who said, "We ourselves establish church authority for ourselves" (183). But this was an impermissible breach of canon law. The civil courts are concerned not with the *why* but only with the *fact* of secession and its legal consequences (*Watson* v. *Jones*). The Christian Church would hardly have survived if a diocese were free to secede because of its displeasure at the course of events.

"resolved that His Beatitude Alexy, Patriarch of Moscow, and all Russia, be requested to continue us in his fold and be our Spiritual Head" on terms of autonomy (222).

The life history of the metropolitan district is this: In 1924 it withdrew from the Russian church at large; in 1936 it subjected itself to the authority of the Karlovitz Synod; and in 1946 it seceded from that organization and sought to rejoin the Patriarchate.

The Patriarch at all times took the position that the organization of the metropolitan district and the actions of Platon and Theophilus violated "the canons, rules and usages of the Russian Orthodox Church and are null and void" (165, 224-5, 147-8, 149) and placed Platon and Theophilus under suspension (165-6, 225).[8] Like rulings were made outlawing the Karlovitz Synod from the very beginning (141-3, 109-10).

Subsequent to the Sobor of 1945, where the present Patriarch was elected, negotiations for reunion between the Patriarch and the metropolitan district proceeded up to the date of trial in 1948 (131-3, 219-21). Representatives of the district had arrived one day too late to attend this Sobor (126), but, since the district was then under patriarchal suspension and was subject to the jurisdiction of the Karlovitz Synod, it had no canonical right of representation. However, they received from the Patriarch the ukase

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[8] The autonomy was not declared "pursuant" to the Patriarchal order of November 1920 (177-9), as the majority assert (302 N. Y. at 33). That order was not designed to liquidate the Russian Church. It was addressed to dioceses in Russia whose "activity * * * should stop" and who were cut off "for reasons of movement of the front" (177). It did not authorize secession, had no application to the American Diocese (43, 109, 139-40) and was not referred to in the resolutions at Detroit (187-9). Any action taken thereunder had to be confirmed by the Patriarch (179) and the acts of the metropolitan district were condemned (165-6, 189, 224, 141). The district did not rely on this order in the *Kedrovsky* trial and, only recently, partisans of the district have seized on this order as a belated after-thought to lend color of canonicity to the secession which took place independently of it.

of February 1945 as a basis for negotiations for reunion (127, 227-8).

In a highly self-serving manifesto (209-19), the leaders of the district rejected this ukase on the alleged ground that it demanded a pledge of loyalty by the American clergy to the Soviet government (216, 219). The claim was unfounded and Professor Feodotov acknowledged that the ukase made no such demand (157-8).[9] It requested "abstention" from political activities and the metropolitan district itself admonished its clergy in 1944 "for the general welfare, not to touch upon political questions and not to make any public speeches on the subject, especially from the pulpit" (216). The *membership* of the district saw in the ukase no such demand, for, in their 1946 convention, they requested the Patriarch to "continue us in his fold" on terms of autonomy (222). The subsequent negotiations foundered, not on the false claim of a demand for a pledge of loyalty, but, as the Appellate Division found, on the purely ecclesiastical question as to the scope of the patriarchal power to confirm locally elected bishops (276 App. Div. at 319-20).[10]

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[9] In this respect the manifesto followed the familiar propaganda technique of ascribing to an apponent unacceptable claims *not* made by him.

Since the alleged demand of such a pledge is the principal basis for the "determinative" ground of the decision below, we consider this issue at pp. 30-33 of this brief, *infra*.

[10] The canon law provides that where a Bishop may be elected locally, "his election shall be submitted to the confirmation of the Supreme Church Authority" (20, 136, 26-7). Such confirmation is indispensable to apostolic succession. Canonically, a priest cannot be "elected" a bishop, he is merely "elected" a candidate for confirmation and consecration by Higher Authority, and such an "election" is not binding on the Patriarch. Even the demands of the metropolitan district for full autonomy accepted and acknowleded the right of the Patriarch "to veto the election of the metropolitan or Bishops", but sought to limit the grounds of veto to those of canon law and morals (217-218).

Specification of Errors

The New York Court of Appeals erred in reversing the judgments in favor of appellants and awarding judgment in favor of appellee.

Appellants tender the following issues which have been included in the assignment of errors.

The Constitutional Issues Presented

1. Is the ouster, by force of the statute, of appellant Benjamin, the appointed archbishop, from St. Nicholas Cathedral, a violation of protected religious liberty?

2. Is such ouster, by force of the statute, a deprivation of property without due process?

3. Is the retroactive application of the statute to the case at bar, which was commenced one day *before* the statute became law, a denial of due process?

4. Is the direction that the Trial Court exercise its "discretion" to determine if the appointed archbishop is a "proper trustee" or a "proper person" to occupy St. Nicholas Cathedral, a violation of protected religious liberty?

a). Is the use of the *Kedrovsky* record, as a basis of the decision against appellants, violative of due process?

5. Does the failure and refusal of the Court of Appeals to rule on the merits of appellant Benjamin's defense of the statute of limitations, while directing final judgment against him, violate due process?

Summary of Argument of Point I

The Russian Orthodox Church is an hierarchal church and its supreme authority is the Patriarch. The American Archdiocese is a constituent part of the Russian Church and is governed by an archbishop *appointed* by the Patriarch. The ruling by the Patriarch that the secession of the metropolitan district is canonically void is conclusive and binding here. St. Nicholas Cathedral was built by the central church for the exclusive use of its appointed archbishop as a place of worship, as his residence and his headquarters; its consecration as a Cathedral means its dedication to such use. Occupancy of the Cathedral by the appointed archbishop is required by canon law. Appellant Benjamin is the duly appointed archbishop and thus entitled to the possession of the Cathedral.

The compulsory statutory transfer of the Cathedral from the jurisdiction of the Patriarch to the jurisdiction of a locally elected archbishop and the ouster from the Cathedral of the patriarchally appointed archbishop, prohibits the "free exercise" of religion by the Patriarchal Church and its archbishop, interferes in the internal affairs of that church and nullifies its canon law, in contravention of the First Amendment, made applicable to the States, by the Fourteenth.

The alleged "finding" that the Patriarchal Church is not "free", is arbitrary, without any factual support and may not be based on judicial notice. The statute makes no such finding and it may not be ascribed to it by "presumption". In any event, it cannot furnish justification for restraints on religious liberty.

POINT I

The statute, as construed and applied by the Court of Appeals, constitutes an abridgment of freedom of religion guaranteed by the First Amendment to the United States Constitution, made applicable to the States by the Fourteenth.

A. The First Amendment withdraws from the civil power the entire field of religion and the internal government of all religious societies.

It is now settled that the Fourteenth Amendment makes applicable to the states the command of the First Amendment that Congress shall "make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *" (*McCollum* v. *Board of Education*, 333 U. S. 203, 209-12; *Everson* v. *Board of Education*, 330 U. S. 1, 8).

What is prohibited is not merely the establishment of a *Church* but any "law *respecting* (*i.e.*, dealing with, relating to, regarding) an establishment of religion or prohibiting the free exercise thereof", *i.e.*, of religion. In other words, the whole field of religion is placed beyond the reach of the civil power. In his famous Memorial and Remonstrance, Madison said: "Religion is wholly exempt * * * from the authority of the Society at large" (Appendix I to dissent of Justice Rutledge in *Everson, supra*, pp. 64-5). Responding to a request that he proclaim a national fast day, Jefferson wrote: "I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, disciplines or exercises" (Moehlman: *The Wall of Separation Between Church and State*, p. 102). Writing to the Danbury Baptists Association, Jefferson said that he contemplates "with sovereign reverence" the constitutional guarantee of religious liberty which built "a wall of separation between church and state" (*Moehlman, supra*, p. 108).

After Christianity became the exclusive religion of the Roman state, the Church not only sought to suppress

heresy, but, after the fall of Rome, as the residuary legatee of the Roman Empire, claimed supremacy in secular affairs also.[11]

The Protestant Revolution replaced Papal Supremacy with the Royal Prerogative.[12] Although the Reformation was based on the right of private judgment in religion, it established new orthodoxies which engendered new persecutions and many of its victims settled in the Colonies, where they planted the seeds of the religious persecutions from which they had fled.

The Founding Fathers sought to rescue the nascent Republic from the ills that had afflicted the old world resulting from the rival claims of Church and State, and, in view of the numerous religious sects and denominations in the Colonies, embroilment in religious disputes might have been fatal to the early Republic.[13] They believed in the *principle* of religious liberty and in the *policy* of complete separation of Church and State, of City and Temple, as the best method of preserving liberty and ensuring domestic peace. That was the philosophy of the First Amendment and it was based on the primal principle promulgated by Jesus, "to

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[11] "According to Innocent, the Pope is lord of earthly states as well as of the Church. Princes, like Bishops, are his agents, charged with the duty of carrying out his will" (McGiffert, *History of Christian Thought*, Vol. 2, pp. 339, 334-41). The theoretical foundations for this position were laid by St. Augustine (Gettell, *History of Political Thought*, pp. 88-91; see also Stokes, *Church and State in the United States*, Vol. I, pp. 39-41).

[12] Hobbes in England and later Hegel in Germany assigned to the state the same authority as St. Augustine claimed for the church. This doctrine is called Erastianism (Rommen, *The State in Catholic Thought*, pp. 65, 61).

[13] "Half the wars of Europe, half the internal troubles that have vexed European States, from the Monophysite controversies in the Roman Empire of the fifth century down to the Kulturkampf in the German Empire of the nineteenth, have arisen from theological differences or from the rival claims of Church and State. This whole vast chapter of debate and strife has remained virtually unopened in the United States." (Bryce, *The American Commonwealth*, Vol. 2,

render unto Caesar what is Caesar's, and to God what is God's" (Stokes, *Church and State in the United States*, Vol. III, pp. 694-5; Vol. I, pp. 28, 37).

This Court has characterized freedom of religion as "implicit in the concept of ordered liberty" (*Palko* v. *Connecticut*, 302 U. S. 319, 325); it has assigned to it a "preferred" position among our basic liberties (*Marsh* v. *Alabama*, 326 U. S. 501, 509; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115; *Follett* v. *McCormick*, 321 U. S. 573, 577); it has invested the freedoms protected by the First Amendment with a "sanctity and sanction not permitting dubious intrusions" (*Thomas* v. *Collins*, 323 U. S. 516, 530); it has declared that where a statute touches an area protected by the First Amendment, the presumption is *against* its validity (*West Virginia School Board of Education* v. *Barnette*, 319 U. S. 624, 639; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153, note 4). Justice Murphy, dissenting in *Prince* v. *Massachusetts* (321 U. S. 158) said that the freedoms of the First Amendment "are presumed to be invulnerable" and any attempt to curtail them "is *prima facie* invalid" (p. 173).[14] See also *Busey* v. *District of Columbia* (138 Fed. (2d) 592, 595).

This Court has recently given expression to the principles which give religious freedom constitutional immunity from invasion by the civil power.

In *Everson* v. *Board of Education*, 330 U. S. 1, this Court said:

> (p. 15) "The 'establishment of religion' clause of the First Amendment means at least this: Neither a State nor the Federal Government can set up a

[14] The majority below erroneously apply to Article 5-C the rule of presumption generally applicable to statutes concerned with commercial or secular activities (302 N. Y. at 30-33). Even so, this inapplicable presumption does not save the statute for there is no "rational" connection between occupancy of the Cathedral by the appointed archbishop and any interest the state may protect, or any imminent danger to the state.

> church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. * * * Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice-versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'."

The constitutional guarantee of religious freedom means, the Court further said, that the state shall be "neutral" in the field of religion and shall not "favor" or "handicap" one church as against another (p. 18).

McCollum v. *Board of Education*, 333 U. S. 203, reaffirmed the principles of the *Everson* case, and said:

> (p. 212) "For the First Amendment rests upon the premises that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective spheres. Or, as we said in the *Everson* case, the First Amendment has erected a wall between church and state which must be kept high and impregnable."

In his concurring opinion, Mr. Justice Frankfurter cited with approval the statement of Judge Jeremiah S. Black (note 8, p. 219):

> "The manifest object of the men who framed the institutions of this country was to have a *State without religion* and a *Church without politics*—that is to say, they meant that one should never be used as an engine for any purpose of the other" (italics in original).

Dissenting in *Everson*, Justice Jackson said that religious freedom "was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms and its strength is its rigidity. It was

intended not only to keep the State's hands out of religion, but to keep religion's hands off the State" (p. 26).

The constitutional guaranty not only protects religious belief, but also the "free exercise thereof". In *Cantwell* v. *Connecticut*, 310 U. S. 296, this Court defined the "double aspect" of the constitutional guaranty as "freedom to believe and freedom to act", saying:

> (p. 303) "On the one hand, it forestalls compulsion by law of acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to *adhere to such religious organization* or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free *exercise* of the chosen form of religion. Thus the Amendment embraces two concepts—freedom to believe and freedom to act" (italics added).

In other words, the government of a Church—its internal management as well as its creed—is within constitutional protection.

Representative applications of these principles are found in the following cases:

Pierce v. *Society of Sisters*, 268 U. S. 510, held violative of religious liberty, a statute requiring the attendance in public schools of children who wished to attend parochial schools. Allied in principle is *Meyers* v. *Nebraska*, 262 U. S. 390, which held violative of protected liberty a statute forbidding the teaching of foreign languages in parochial schools to any child below the eighth grade.

This Court held restrictive of protected religious liberty regulations of states or cities which (a) taxed the sale of religious literature by itinerant salesman (*Jones* v. *Opelika*, 319 U. S. 103; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Follett* v. *McCormick*, 321 U. S. 573); (b) forbade the ringing of doorbells or knocking on doors in private dwellings to distribute religious literature (*Martin* v. *Struthers*, 319

U. S. 141; (c) required a permit to distribute religious literature on public streets (*Lovell* v. *Griffin*, 303 U. S. 444), or to solicit on public streets contributions for religious purposes (*Cantwell* v. *Connecticut*, 310 U. S. 296), or to preach in public areas (*Kunz* v. *New York*, 340 U. S. 290), or to conduct a religious meeting in a public park (*Niemotko* v. *Maryland*, 340 U. S. 268); (d) or forbade the distribution of religious literature on the private property of a company town (*Marsh* v. *Alabama*, 326 U. S. 501) or on Government property (*Tucker* v. *Texas*, 326 U. S. 517).

West Virginia School Board of Education v. *Barnette*, 319 U. S. 624, condemned, as an invasion of religious liberty, a requirement that children salute the flag in public schools.

McCollum v. *Board of Education*, 333 U. S. 203, barred the State from using its public school facilities to aid a program of released time for religious instruction of children.

In the foregoing cases (except *McCollum*, which involved State aid to religion) this Court protected religious freedom as the paramount value, notwithstanding that its exercise conflicted with other social interests, such as the right of privacy and freedom from trespass, and the need of the State to regulate the use of public areas, to raise revenue, to inculcate patriotism and to promote national unity.

In our case, occupancy of the Cathedral by Metropolitan Benjamin—an exercise of his religion—does not conflict with any rights of others. It involves merely the government and discipline—the internal affairs—of a church, and in such a case, the controlling principle was expressed by Mr. Justice Jackson in *Prince* v. *Massachusetts*, 321 U. S. 158, when he said:

> (p. 177) "Religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be."

Particularly in point here is the landmark case of *Watson* v. *Jones*, 13 Wall. 679, where this Court emphasized the incapacity of the civil power to sit in judgment on the actions of religious bodies or to interfere in their internal affairs. It quoted with approval the following:

> (p. 730) "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority. The judgments, therefore, of religious associations, bearing on their own members, are not examinable here. * * *"

This Court also pointed out that in view of the fundamental principle of separation of church and state, our legal tribunals must accept as "final" and "binding" the acts, decisions and determinations of the chief authorities of an hierarchal church respecting any "questions of discipline * * * or ecclesiastical rule, custom or law" (at 727-8); that matters of "church discipline" and "ecclesiastical government" are outside the range of the civil power (at 733). The ruling was that a subordinate body of the Presbyterian Church may not, because it favored slavery which the chief authorities had condemned, lawfully secede and, if it does, its property remains subject to the jurisdiction of the central church (p. 734). In our case, the Patriarch is not claiming any churches which seceded, but the seceders want to take over the Cathedral, which is subject to the central church.

We thus see that this Court has been zealous to keep an exercise of religion and the governance of churches immune from the civil power, whatever be the form or method of attempted invasion.

B. The statute, by compelling the transfer of St. Nicholas Cathedral from the jurisdiction of the Patriarch to that of a locally elected archbishop and by compelling the ouster from possession of the Cathedral, required by canon law, by the patriarchal archbishop, violates the constitutional guarantees of religious liberty.

Turning to the case at bar, Article 5-C, as construed and applied here,[15] is, we submit, a gross and direct interference with religious liberty, violative of the First and Fourteenth Amendments.

We do not have here a statute "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantive interest of the state" (*Cantwell* v. *Connecticut*, 310 U. S. at 311), but a general statute outlawing a Church in its entirety.

The canon law of the Russian Church says that the archbishop appointed by the Patriarch must occupy St. Nicholas Cathedral. The statute says no; the archbishop elected by a seceding group of churches shall do so and, as a consequence, the accredited archbishop is ousted from possession and is barred from conducting *religious* services in the Cathedral.

The canon law says that a mission or diocese of the Russian Church, such as the American Archdiocese, is subject to the ecclesiastical government of the chief authorities and may not canonically secede from the Church. The statute not only sanctions this but awards the Cathedral to the seceders, contrary to *Watson* v. *Jones*.

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[15] Actually, the statute expressly limits itself to that "group" of churches which "now constitute" the metropolitan district (sec. 105), and further limits itself to such "incorporated" churches (sec. 107). Thus, *unincorporated* churches, even those which belong to the district, lie outside the coverage of sec. 107. Yet, by the use of unfounded "presumptions", the majority read into the statute a "mandate" for the compulsory subsection to the metropolitan district of patriarchal churches, including the Cathedral. The majority discover in the statute what they put into it. However, we must read the statute with the gloss they impose on it, however unjustified it be.

The canon law says that a bishop shall be appointed by the chief authorities of the church or, if locally elected, shall be confirmed and consecrated by higher authority, so that the chain of apostolic succession may not be broken. The statute requires all Russian churches, even though they question the regularity of the apostolic succession of the elected, but unconfirmed (26,28), archbishop of the seceders, to "recognize and be and remain subject to the jurisdiction and authority" of the seceders and such elected, but unconfirmed, archbishop.

A statute that commands that a church "shall recognize and be and remain subject to the jurisdiction and authority" of one church instead of another, of one archbishop instead of another, is unconstitutional on its face.

A statute that says that "every" Russian church and all its properties "shall be and remain subject to the jurisdiction" of the metropolitan district and its elected archbishop, dispossess the Patriarchal Church from all its properties, prevents any of its churches from existing in this state, and prohibits the free exercise of religion by that church.

The statute not only *prohibits* the exercise of their religion by the Patriarchal churches, but *compels* them to accept the jurisdiction of a rival church.

By this statute, the civil power departs from its position of "neutrality" in the field of religion and "prefers" the seceding group to the total exclusion of the Patriarchal Church.

The statute literally establishes the metropolitan district as the official or orthodox Russian Orthodox Church in this state—an express violation of the First Amendment, which declares that the state "shall make no law respecting an establishment of religion * * *."

The edict of Milan issued in 313 A. D. by Constantine, the first Christian Emperor of the Roman Empire, granted

> "both to the Christians and to all others, free power of following whatever religion each may have pre-

> ferred. * * * The absolute power is to be denied to no one to give himself either to the religion of the Christians, or to that religion which he thinks most suited to himself" (*Drozda* v. *Bassos*, 260 App. Div. 408, 411).

The majority denies Russian churches in the State of New York a freedom of affiliation which even the Roman Emperors allowed.

Parliament, in Elizabeth's time, decreed that "the Bishop of Rome hath no jurisdiction in this realm of England" (5 Encyclopedia Britannica, p. 673). The statute here, in effect, says that the Patriarch of Moscow hath no jurisdiction in the State of New York and, if this be permitted, in principle and logic, New York can also deny jurisdiction to the Bishop of Rome, the Patriarch of Constantinople, or any other Hierarch or Church. It was just such an exercise of power over religion by the State that the First Amendment was designed to forbid.

The official name of the Eastern Church is "The Holy Orthodox Catholic Apostolic Eastern Church." The Russian Orthodox Church is an integral, though autocephalous, part of this Catholic and Apostolic Church. The traditional position of the Russian Orthodox Church is that it is apostolic in origin and descent, that this apostolic succession is preserved through the institution of its Ecclesiastical Hierarchy in an unbroken succession from Christ and His disciples, that its bishops have been consecrated by those duly qualified and duly authorized by Higher Authority to perform this sacrament, and that there must be no defect anywhere in the line of descent for the transmission of grace.

Many believe, and with reason, that the metropolitan district lacks apostolic succession and has no canonical standing; indeed, the Patriarch has so ruled. The status of Metropolitan Theophilus as a bishop is in doubt for his consecration was not authorized or confirmed by higher authority as required by canon law (26, 28, 165-6), and he is

now under canonical suspension. That the metropolitan district itself felt and still feels an inner insecurity on that score, is shown by the memorandum, self-serving though it is, prepared by Professor Feodotov and his associates (Defendants Exhibit I, 242-7). That is why, in the hope of joining the Universal Church and acquiring apostolic succession, the metropolitan district had subjected itself to the Karlovitz Synod, on the theory that that body was a canonical hierarchy, but even that gossamer link (if it ever existed) with Universal Orthodoxy is now broken (244), and the metropolitan district is again in a canonical void. In these circumstances, for the civil power to direct all Russian Orthodox churches to "recognize" and subject themselves to the "jurisdiction" of a bishop and a district whose canonicity, whose apostolic succession, they may hold in doubt, is a grave intrusion into that field of conscience which is protected by the Constitution and the elementary decencies as well.

We thus see that the statute, as construed and applied, penetrates the field of religious liberty on a deeper and wider front than any legislation heretofore attempted. In the words of the dissenting judges (302 N. Y. at 39), the statute, as construed by the majority,

> "had the precise and intended effect of freeing the whole Russian Orthodox religious community in America from its traditional submission to its supreme hierarchial head, of outlawing in New York so much of that community as remained submissive to the Patriarch, of putting the whole group and all its properties under the control of the new schismatic 'Russian Church of America', and, specifically, of mandating the ouster of the patriarchally appointed archbishop and the substitution of a rival claimant, not so appointed. We confidently assert that there is nothing in the statute itself to suggest such a legislative coup, that there is much to show that such was not the legislative purpose, and that the statute, if so intended and so construed, is plainly unconstitutional."

It is also wholly unprecedented. "No other decision reaching such a result can be found in the books" (302 N. Y. at 36).

C. The proffered justification for the statute—the "determinative" finding that the Patriarchate is not "free"—is inadmissible.

Assuming that there can ever be justification for interference with religious liberty by the state,[16] what justification is there in this case for this intrusion into the field of conscience?

The majority make a finding, which they characterize as "determinative" (302 N. Y. at 22), that the Patriarchal Church is not "free", is not "a true religious body" and is "a tool" of the Soviet Government (302 N. Y. at 35, 22, 30, 33), ascribe this finding to the Legislature by "presumption" (302 N. Y. at 30, 33) and see in this "presumed finding" constitutional sanction for the compulsory transfer of the Cathedral from the jurisdiction of the Patriarch to that of the elected archbishop of the metropolitan district (302 N. Y. at 30).[17]

This "determinative" thesis, simply stated, is that since the Patriarchal Church is not "free", therefore—any conclusion whatever. That pregnant premise removes all

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[16] *Prince* v. *Massachusetts*, 321 U. S. 158, sustained, as a measure to protect adolescents, a statute, void if applied to adults, prohibiting the sale of religious literature on the streets by girls under 18 and boys under 12 years of age. *Reynolds* v. *United States*, 98 U. S. 145, and *Davis* v. *Beason*, 133 U. S. 333, held that polygamy, which was a crime at common law and was "odious" to western civilization, could be prohibited by statute and that members of the Mormon Church could not practice polygamy, and thereby commit bigamy, in the name of religion.

[17] The euphemism employed by the majority is that the statute made a "determination" that the metropolitan district is "the authentic group, as of today, entitled to the administration" of all Russian churches and the "proper trustee" thereof (302 N. Y. at 30, 21, 24). Nevertheless, they say that patriarchal churches founded *after* 1924 are not covered by the statute (302 N. Y. at 29; see this brief, pp. 37-8, *infra*).

legal barriers and restraints of precedent to "free decision" by the majority to reach any desired result. Since the Patriarchate is not "free", *Watson* v. *Jones*, the principle of non-interference in the internal affairs of a religious society, are irrelevant, the canon law of the Russian Church is nullified, its appointed archbishop is thrust aside, and other "trustees" and "beneficiaries" of the Cathedral are sought out, more agreeable to the civil court. Here, indeed, is a rare and novel doctrine and theory of decision, whereby a Court, on its own motion, may suppress *any* church whatsoever, disregard its canon law, reorganize its internal government, because it disapproves of the relation between the chief authorities of a church and the civil power of its domicile. Today it is the Patriarchal Church that falls victim to this theory, tomorrow it may be another.

1. The finding that the Patriarchate is not "free" is arbitrary, without evidentiary support and contrary to the evidence and findings of the triers of the facts.

This finding has no basis in fact and is wholly arbitrary.[18] It was made on the Court's own motion, beyond its jurisdiction competence,[19] in defiance of contrary evi-

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[18] This court is not bound by the majority's assertions or conclusions of facts. In *Feiner* v. *United States*, 340 U. S. 315, the Chief Justice said (p. 316): "In the review of state decisions where First Amendment rights are drawn in question we of course make an examination of the evidence to ascertain independently whether the right has been violated." See also *Niemotko* v. *Maryland*, 340 U. S. 268, 271, and *Watts* v. *Indiana*, 338 U. S. 49, 51.

[19] Appellee did not raise this issue at the trial, as the record shows (148-9). It was imported into the case by the minority in the Appellate Division (276 App. Div. at 318), and was later adopted by the majority in the Court of Appeals. Such a finding is beyond the jurisdictional competence of that Court which, with exceptions not material here, has no power to make independent findings of fact, and is limited to rulings on questions of law only. (Constitution of the State of New York, art. 6, sec. 7; New York Civil Practice Act, sec. 605.)

dence in the record and contrary findings by the triers of the facts (276 App. Div. at 319-20).[20]

None of appellee's witnesses gave any testimony that the Patriarchate was not "free" or was not a "true religious body". On the contrary, Professor Feodotov's memorandum acknowledged the canonical continuity and the restoration of the full authority of the Patriarchate and urged reunion with that church (242-6, 106-7, 31). He accepted, as correct, the assertion of the Patriarch that "Our Russian Church has not been led astray. * * * It has kept unsullied its canonical consciousness and at the same time its correct and canonical supreme direction—that is, its part in the life of grace of the Ecumenical Church and its right place in the harmony of the Orthodox Autocephalous Churches" (102-3, 104). In 1946, the metropolitan district itself resolved that "His Beatitude Alexy, Patriarch of Moscow and all Russia be requested to continue us in his fold and be our spiritual head" on terms of autonomy. Patriarch Sergius emphasized the "contradiction" between the Russian church and the Bolshevik regime (207) and Metropolitan Gregory testified, without being cross-examined (167), that the Patriarchal Church "is functioning freely as an Orthodox Church, without interference by the civil authorities" (167). There is not a word of evidence to the contrary.

2. The finding that the Patriarchate is not "free" may not be made by judicial notice.

This "determinative" finding is based on "judicial notice" of "historical facts" (302 N. Y. at 21, 23, 34), in spite of the above contrary evidence and findings, and notwithstanding that a substantial body of informed and non-partisan opinion supports a different view. (See chap-

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[20] This, says the dissent (302 N. Y. at 37), "amounts to a *new* finding by this Court, *without evidentiary* support in this record and in the *face of contrary* testimony and *express contrary findings* by both Courts below" (italics added).

ter on *"Religion in the Soviet Union"*, pp. 127-32, in House Document #754, published in 1946, prepared by the Library of Congress; Casey, *"Religion in Russia"*, pp. 178, 182-90, Harper & Bros., 1946; Bolshakoff, *"The Christian Church and the Soviet State"*, p. 55, MacMillan & Co., 1942; Timasheff (Professor at Fordham), *"The Great Retreat"*, pp. 227, 237, Dutton & Co., 1946; Anderson, *"People, Church and State in Modern Russia"*, pp. 214, 89-94, MacMillan & Co,. 1944.) Mr. Anderson says (p. 214) that the Russian Church "desires to be and feels itself to be the Church of the *Russian people,* not the Church of the *Soviet State"* (italics added). Former Ambassador Smith, in his, *"My Three Years in Moscow"*, Harper & Bros., 1950, states that "while the Communist Party has been successful in retaining that which is Caesar's, its direct efforts to capture also that which is God's, has been quietly but decisively rejected by the masses of the older Russian people" (pp. 264-5). He also refers to the "mysterious" power of religion in Russia which "is impelled by forces and governed by laws of its own which not even the Kremlin understands" (p. 279), and observes that a danger to the Russian Church lies in being isolated from the West (pp. 264-5). Fuller documentation on this issue is given in Appendix B hereto attached.

In such a case, findings by judicial notice, which gives only "limited illumination", are improper. Judicial notice may be taken only of matters which are capable of "instant and unquestionable demonstration" (Wigmore on *Evidence,* vol. IX, Secs. 2571, 2565). Where controversy exists as to an issue or where a claim may be disputed by competent evidence, judicial notice is inappropriate. Professor Morgan, in *"Judicial Notice"*, 57 Harvard Law Rev. 269, says:

> (pp. 292-3) "There is danger of misuse and abuse of judicial notice * * *. He (the judge) may treat a half-truth as though it were the whole truth. * * * Consequently, protection to litigants should be pro-

vided (a) by furnishing them full opportunity to be heard in time to make their contentions effective and to make a record which will assure review by appellate tribunals and (b) by using judicial notice only when the matter clearly falls within the domain of the indisputable."

Here, the majority violated this rule in both respects. They applied judicial notice in the domain, not of the indisputable, but of the highly controversial, and did this notwithstanding that the issue was not raised at the trial.

3. There was no demand for a "pledge of loyalty" by the clergy abroad to the Soviet State.

Upon what ground then do the majority assert that the Patriarchate is not "free"? They point (a) to the imprisonment of the Patriarch—in 1923, (b) the emergence of the Living Church—which disappeared in 1925 (164, 42), and (c) the alleged demand for a "pledge of loyalty" in 1927 when the Patriarchate was restored (302 N. Y. at 23, 15). Only the last claim need be considered.

There is no proof whatever to support the assertion of the majority that the Patriarch attempted to "exact" or promised to "secure" from the clergy abroad a pledge of loyalty to the Soviet State, let alone such a "written" pledge, as Judge Conway asserts (302 N. Y. at 15). This is an arbitrary assertion without any factual support whatever.

4. The alleged "pledge of loyalty" by Patriarch Sergius to the Soviet State in 1927 does not show that the Patriarchate is not "free".

a) Patriarch Sergius, we submit, was addressing the Russian clergy in 1927 when he spoke of "our sincere readiness to be law abiding citizens of the Soviet Union, loyal to its government * * *", at the same time em-

phasizing that "we cannot be silent about the contradiction which exists between us Orthodox and the Communist Bolsheviks who govern our Union" (207).

A student of church history will recognize this as a statement of the classic position of the Christian Church with respect to any political or economic system. It is in full harmony with the recent pronouncement of His Holiness, Pope Pius, wherein he said that the Church "does not meddle in problems purely political and economic, nor does she deign to pass judgment upon the usefulness or the harm of one form of government or another" (New York Times, Feb. 21, 1949, p. 3; see also Dunning, *History of Political Theories*, pp. 152-3). The Patriarch had, at first, anathematized the revolution (101), but when the Soviets became the *de facto* government he could not reverse the verdict of history. All churches are—they must be—"loyal" to the Caesar of the day, that is, the clergy must be law abiding citizens and not political revolutionaries; the Orthodox Christian will be "always and everywhere" an exemplary citizen of "any" state "including that of the Soviets" (207).[21] Christians are also citizens and must obey their rulers—even non-Christian rulers. "Obedience to the state was demanded as a religious obligation as well as a political necessity" (Gettell, *History of Political Thought*, p. 87; Rommen, *supra*, pp. 12, 583). We respectfully submit that the position of Patriarch Sergius is in full conformity with Christian tradition.

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[21] Metropolitan Benjamin also testified that the policy of the Church was that of "refraining from politics only * * * both in the Church and in the name of Church" (114, 122), that "you may criticize the Soviet government, but only as private men" (123), that this was "an expression of the Christian attitude to the government" (123), that it was its duty to preach the Gospel but "not politics" (124), that this policy was for "the good of the church" (125), and that the "answer of the Russian Church is absolutely clear. It cannot prevent any citizen from fulfilling his obligations and does not demand it" (124).

The Christian Church, regarding itself eternal, appraises temporal events *sub specie aeternitatis*. The Church knows that it has to live, if not under, at least with Caesar. The Church has seen Caesars come and go and it survives because it makes its terms with the Caesar of the moment, not to serve him, but to serve the long range interests of the Church. The Pope made a treaty with Mussolini [22] and the Patriarch with the Soviet and neither Church may be punished by our civil authorities on that account.

b) When is a church "free"? Was the Papacy free in Avignon? Was the Catholic Church free under Mussolini? The Protestant Church under Hitler? Is the Catholic Church free in Spain? Was the Karlovitz Synod, which the metropolitan district accepted as its higher church authority from 1936 to 1946, free when Hitler ruled Yugoslavia? In a theorcracy does the state govern religion or religion the state?

Was the Russian Church free under the Czars? The majority apparently think so, for they regard the archbishops of the American Archdiocese, appointed prior to 1917, as "in proper and direct canonical succession" (302 N. Y. at 6). But under the Czar, the Church was more than "loyal" to the government. It was a State Church, subsidized by the regime (100, Pares, *Russia and the Peace*, pp. 34-37). The Czar's procurator dominated the Synod (88-9, Curtiss, *Church and State in Russia*, pp. 52-54). The bishops took an oath of loyalty to the Czar (Fortescue, *The Orthodox Eastern Church*, p. 296). It was the Czar who appointed the archbishops of the American Archdiocese (89). Would a group or even all of the

[22] By Article 20 of the Lateran Concordat of 1929, all Bishops took "an oath of fealty to the Head of the State" and swore and promised to respect and make the clergy respect the government and to "avoid any course that may injure" the Italian State (*Italy Today*, 1929, New York Public Library). Rommen, *supra*, says that many Concordats gave the civil authorities "a certain influence upon the appointments of bishops" (573).

Russian churches in America have been permitted, prior to the Revolution, on democratic grounds, on the ground that there was no "political freedom" in Russia, that the Church was not "free", that it was a "tool" of the Czar, etc., to secede—and take with them the Cathedral which was the property of the Church at large?

The fundamental fact is that the *nature* of the civil power in Russia, whether that of Czar or Commissar, and the relation of the Church with that power, have nothing whatever to do with the canon law of the church and the administration here of the internal affairs of the church in accordance with that law. The relationship between Church and State is a matter of high church policy to be determined by the Chief Authorities of the church and such policy is conclusive upon all the members of the church and upon the civil power in all matters affecting the church and its members (134). Our Courts have no power to pass upon the propriety of the policies or the acts of the Patriarch; they have "no power or right to adjudicate that the incumbent is no true Patriarch. * * * The Patriarch, like all men, must account for his stewardship, but not to the New York courts" (302 N. Y. at 38).

5. The finding that the Patriarchate is not "free" may not be read into the statute by presumption.

Nor can such a finding be ascribed to the legislature by "presumption" (see *Thornhill* v. *Alabama*, 310 U. S. 88, 95-6). As we have seen, a statute touching religious liberty cannot be saved by presumptions. In the *Barnette* case (319 U. S. 624) this Court said:

> (p. 639) "The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. * * * The right of a state to regulate, for example, a public utility, may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may

have a 'rational basis' for adopting. But freedom of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."

With respect to restrictions on First Amendment freedoms, this Court also said in *Thomas* v. *Collins* (323 U. S. 516) that the "rational connection between the remedy provided and the evil to be curbred, which in other contexts might support legislation against attack on due process grounds, will not suffice" (p. 530).

Busey v. *District of Columbia*, 138 Fed. (2) 592, held that the existence of facts justifying a tax on the sale of religious tracts will not be "presumed" and that the burden is cast on those who seek to uphold the tax to establish the facts which would justify it (p. 595).

In any event, the asserted "presumption" in the case at bar has no factual support whatever and is wholly arbitrary and fictional.

6. The legislature did not find that Patriarchate is not "free" and the "presumption" that it did is wholly arbitrary and fictional.

What was the attitude of the legislature toward the Patriarchal Church in 1945 when Article 5-C was passed? On that point, we have no direct evidence from findings, declarations of policy or legislative hearings. However, we do know that in April 1945 the World War had not yet terminated, that the United States and the Soviet Union were still allies, that not even the beginnings of the present tensions were then discernible, that, just two years before, in 1943, the legislature had by Article XV and section 15 of Article 2 of the Religious Corporations Law, chosen the Patriarchal Church intsead of the metropolitan district, as one of the four "primary" Orthodox

jurisdictions in the state of New York, that Governor Dewey had publicly acknowledged Metropolitan Benjamin, the present appellee, as "the living successor" of the traditional, accredited archbishops of the American Archdiocese (302 N. Y. at 44), and that the metropolitan district was then subject to the Karlovitz Synod, which had been allied with Hitler. In such circumstances, the suppression of the Patriarchal Church and the compulsory transfer of its churches to the metropolitan district, would have been wholly arbitrary, indeed, inexplicable.

Judge Conway states that "in passing upon matters of legislative * * * competence, the courts read the statute in the light of facts which were found by the legislature * * *" and that "the legislature was aware of the contemporary views of qualified observers who have visited Russia and who have had an opportunity to observe the present status of the Patriarchate in the Soviet system" (302 N. Y. at 31, 33).

But the legislature made no "findings" of facts. It's a pure fiction that it did. And the statute should be read in the climate of opinion of 1945 when the statute was passed and not in the light of the agitated opinion of today. The observations of Mrs. McCormick and Ambassador Smith were published in 1950 and, without conceding that they support the position of the majority, the legislature could hardly have known them 5 years earlier. Such a reading of the present into the past should not have been attempted by a terrestrial court.

Judge Conway recites various facts which he says the legislature in 1945 is "deemed" to have known and on the strength of which it is alleged to have outlawed the Patriarchal Church (302 N. Y. at 32-33). But precisely the same facts were before the legislature in 1943 when it selected the Patriarchal Church and not the metropolitan district as one of the four primary Orthodox jurisdictions in the state of New York. No facts are presented—and his-

tory records none—showing that the legislature had reversed in 1945 the favorable opinion of the Patriarchal Church which it held in 1943. Such a revolutionary reversal in opinion in so short a time must have some basis in fact, but the majority offer none, except a "presumption" that what did *not* occur, did occur.

D. The "presumed" finding that the Patriarchate is not "free" furnishes no constitutional justification for the suppression of that Church.

But assuming that the legislature may be "presumed" to have made such a finding with respect to the Patriarchate, could it constitutionally outlaw that Church for such a reason?

The implications of such a position are far reaching indeed.

Is it within the constitutional competence of the legislature to pass judgment on matters of this kind? Has the legislature the power to suppress a church, because it disapproves of the "politics" of the chief Hierarch? Is not the minority below right in saying that a statute which purports to do this is unconstitutional beyond dispute?

Let us examine *American Communications Ass'n.* v. *Douds*, 339 U. S. 382, which is the *only* case cited by the majority in support of their constitutional position. Section 9 (h) of the Management Labor Relations Act, withheld the facilities of the Act from those unions whose officers failed to file with the Labor Board an affidavit to the effect that they were not members of the Communist party. Chief Justice Vinson, for the majority, stressed the fact that, after investigations before committees of Congress, including the committee immediately concerned with labor legislation, it was established by a "great mass of material" and "substantial amounts of evidence", that Communist leaders of labor unions had fomented "political" strikes in

interstate commerce, that it was the intention of Congress, expressed in the declaration of policy in the Act,[23] to curb such political strikes and other kinds of *direct action* and that the remedy proposed by Section 9 (h) bore a reasonable relation to the evil which Congress sought to and had the power to curb, namely, obstructions to commerce by political strikes (339 U. S. at 387, 389, 390-1).

Holding that "beliefs are inviolate" (p. 393), the court further observed that Congress did not restrain the activities of the Communist party as a political organization, did not bar Communists from employment or membership in unions, did not "attempt to stifle belief" (p. 404), but only to prevent illegal *action* (p. 396); that the effect of the statute on the exercise of basic freedoms was indirect, conditional and partial (p. 399), was "relatively small", touching only a "relative handful of persons" (pp. 397, 404). Indeed, under Section 9 (h) Communists can lawfully be *officers* of unions; the only penalty in such case being, that such unions may not enjoy the benefits of the Act. Concurring and dissenting in part, Justice Jackson admonishes us "to lay hold of the citizen when he acts illegally" and "to let his mind alone" (p. 444).

Where in our case are the investigations, the hearings, the findings and declarations of policy, the "mass", the "substantial amounts" of evidence, showing that the Patriarchal Church, sanctioned and approved in 1943, had become an evil in 1945, which the legislature sought to suppress? There is not a shred of evidence that the Patriarchal Church had *done* anything in this state justifying its proscription or that the legislature ever intended anything even remotely resembling suppression.

According to the majority, the statute subjects to the compulsory jurisdiction of the metropolitan district and its elected archbishop *only* those patriarchal churches

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[23] Notwithstanding the above, Judge Conway says (302 N. Y. at 31) that in the *Douds* case Congress *"was assumed"* to have *"found as a fact"* the *"existence"* of the specific evil there involved (italics in original).

which were established *before* 1924 (302 N. Y. at 29), leaving those churches established *after* 1924 free to adhere to the Patriarch.[24] This concession renders meaningless the postulated rationale of the statute, for no proper reason can be advanced for differentiating Russian churches established *before* 1924 from those established *after* that date. Since Article 5-C deals solely with *incorporated* Russian churches (sec. 107) (the number of which is unknown), the proferred constitutional justification for the statute then comes to this: we are to "presume" that the legislature made a "finding" that the Patriarchal Church is not "free", is not a "true" religious body, is a "tool" of the Soviet Government; consequently, the legislature suppressed only those *incorporated* patriarchal churches which were established *before* 1924!

Since the statute in no way touches the Patriarchal Church, a construction that suppresses that church is *necessarily* arbitrary and capricious, *necessarily* rests on fictional assumptions. and *necessarily* resorts to "presumptions" of imaginary "findings", "determinations" and "mandates", which are read into the statute to justify the initial error. The majority thus violate the basic principle known as Occam's razor which says that "Entities are not to be multiplied without necessity" or "It is vain to do with more what can be done with fewer" (Russell, *History of Western Philosophy*, p. 472).

The position of the majority is based on pure fancy—on an unfounded "presumption" of a non-existing "finding" of an imaginary "evil" to be cured by a wholly inappropriate remedy.

Freedom of religion may not be thus struck down.

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[24] Thus Judge Conway says that the "statute was intended to apply to those Russian Orthodox churches founded and established *before* 1924 for the purpose of adhering and being subject to the North American Mission or North American Diocese, and to those Russian Orthodox churches founded and established *after* 1924 for the purpose of adhering and being subject to the autonomous metropolitan district" (302 N. Y. at 29, italics added).

E. Assuming the clear and present danger rule is applicable, the statute fails to meet the test of this rule.

This Court has sustained restraints on speech which created a clear and present danger of some *act* or *conduct* which the government had specifically condemned as an evil,[25] such as: military insubordination and obstruction of the draft (*Schenck* v. *United States*, 249 U. S. 47; *Schaefer* v. *United States*, 251 U. S. 466); interference with the war effort (*Frohwerk* v. *United States*, 249 U. S. 204; *Debs* v. *United States*, 249 U. S. 211; *Abrams* v. *United States*, 250 U. S. 616; *Pierce* v. *United States*, 252 U. S. 239); the attempt to overthrow by violence our economic system (*Whitney* v. *California*, 274 U. S. 357) or our political system (*Dennis* v. *United States*, 341 U. S. 494).[26]

Assuming *arguendo* only,[27] that this rule is applicable here, it is manifest that the statute cannot survive the test of the rule.

Here the Patriarchal Church has not advocated the commission of any *act* which the State of New York has condemned or can condemn. Occupancy of St. Nicholas Cathedral by its appointed archbishop is not unlawful and cannot possibly be deemed a danger to the State so

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[25] In *Bridges* v. *California* (314 U. S. 252) the requirement was (p. 263) "that the substantive evil must be *extremely serious* and the degree of imminence *extremely high* before the utterances could be punished" (italics added). As early as *Abrams*, Justice Holmes, the author of the rule, dissenting there, said that to be punished, the speech must produce "a clear and *imminent* danger that it will bring about *forthwith*" (250 U. S. at 627) the evil which was condemned (italics added).

[26] Cf. *Fisk* v. *Kansas*, 274 U. S. 380; *Stromberg* v. *California*, 283 U. S. 359; *Taylor* v. *Mississippi*, 319 U. S. 583; and *Hartzell* v. *United States*, 322 U. S. 680, where the speech used was deemed innocuous.

[27] No case, as far as we know, has applied this rule to an exercise of religion, which, it may be urged, should receive greater protection than speech (Stokes, *supra*, Vol. I, p. 552).

clear and present, so grave and imminent, that the State may lawfully prohibit it, thereby nullifying the canon law that requires it and "prohibiting the free exercise" of religion by that Church.

* * *

We do not defend Communism. No lawyer, trained in the western tradition, could honorably do so. But Communism is not the issue, as the minority opinion shows. *Service to the law is the issue.* We must not be impatient with constitutional restraints. Opposition to Communism is not a mandate to bend the law in the supposed interests of the moment. We must not, ourselves, use those methods we profess to loathe in others.

The attack by the majority upon the Patriarchal Church is not merely unjustified, but, we submit, entirely misplaced. Here is an institution, by tradition and principle, orthodox and conservative, with roots deep in the past. The Church is now officially separated from the State (89). It is the only traditional institution that has survived attack by the Soviet Government; and that government has been compelled to come to terms with what seems to be an indestructible force. The Church "has not been led astray", it has not "sullied its canonical conscience". The pronouncement of Patriarch Sergius is explicit about the "contradiction" between the Orthodox Church and Soviet State and reveals an independence of spirit which was never asserted under the Czars. Does it not serve our highest interests to preserve an institution of this character, rather than go out of our way and gratuitously rain blows upon it?

POINT II

The statute, as construed and applied by the Court of Appeals, is a taking of property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

If, by force of the statute, the right to use the Cathedral is taken from the accredited archbishop of the Mother Church and given to another, there would also be a taking of *property* without due process of law. The Cathedral was built by and maintained by the Mother Church with its money for the use of its archbishop. From the very beginning it has so been used. The Mother Church has (apart from its religious and canonical interest) a vested *property* interest in the Cathedral and its use by it and its archbishop as his *residence* and as the headquarters of the diocese. Extinction of that interest and denial of such use by statute or by judicial decision on common law grounds, would be an unconstitutional deprivation of a vested property right.

It is hardly necessary to cite authority to show that neither a legislature nor a court may transfer property from one person to another. That has always been deemed contrary to the Constitution:

Ettor v. *Tacoma*, 228 U. S. 148;
Ochoa v. *Hernandez*, 230 U. S. 139.

POINT III

The retroactive application of the statute to this action, which was already pending when the statute was passed, violates the due process clause of the Fourteenth Amendment.

The present ejectment suit was commenced on April 9th, 1945 (67). The statute took effect April 10th, 1945, one day after this action was begun. In other words, this was a "pending" action when Article 5-C became law.

The statute is not retroactive. It does not say it is. It does not purport to be. As construed, it does not affect mere procedure but fundamental rights, already vested before the statute became law. Retroactive application of such a statute violates due process. See: *Forbes Pioneer Boat Line* v. *Everglades Drainage District*, 258 U. S. 338; *Ettor* v. *City of Tacoma*, 228 U. S. 148.

POINT IV

The direction by the Court of Appeals that the Trial Court exercise its "discretion" to determine whether appellant Benjamin is the "proper person" or "proper trustee" to occupy St. Nicholas Cathedral, violates his religious freedom guaranteed by the First and Fourteenth Amendments.

If appellee is entitled to the Cathedral by force of the statute and, if it is constitutional, the above argument becomes academic.

But even if the statute is void, the above disposition of the case on common law lines violates the constitutional guarantee of religious liberty and should be reversed by this Court. A judicial decision no less than an act of legislation which invades protected religious liberty is void

(*Shelley* v. *Kraemer*, 334 U. S. 1; *Backus* v. *Fort Street Union Depot*, 169 U. S. 557; *Brinkerhoff* v. *Hill*, 281 U. S. 673; *Chicago, B. & O. R.R. Co.* v. *Chicago*, 166 U. S. 226).

I.

The Court of Appeals ruled that, apart from the statute, the judgment in favor of appellants should be reversed on common law grounds, with a direction that the trial court "exercise its discretion along the lines herein indicated," i.e., to determine "whether Benjamin, the appointee of the central church authorities in Moscow, or Metropolitan Theophilus, the Archbishop of the North American metropolitan district, was the proper person to administer the temporalities of St. Nicholas Cathedral and whether he was the "proper trustee" to carry out "more * * * faithfully" the Cathedral trust (302 N. Y. at 24).[28]

Having already found that the Patriarchal Church was not "free", and having declined for that reason to follow the canon law and *Watson* v. *Jones*, and having already declared that there was "ample basis" for the selection of Theophilus as the "proper trustee" (302 N. Y. at 21), the direction that the trial court exercise its "discretion", "along the lines herein indicated", is virtually a direction that Benjamin be rejected and that Theophilus be selected. Remission of the case to the trial court was a necessary formality since the Court of Appeals has no authority to exercise discretion in the first instance.

[28] Notwithstanding their earlier assertion that the Cathedral "was dedicated to the use of the members of the diocese", the majority nevertheless seek to "identify" the "proper beneficiaries" of the Cathedral (302 N. Y. at 4) and now its "proper trustees." But Benjamin does not claim to be the trustee. Appellee, holding the legal title, is the trustee for his benefit (*Watson* v. *Jones*, 13 Wall. at 720-2); *Presbyterian Church* case, 222 N. Y. at 321). The majority arbitrarily convert Benjamin from a beneficiary entitled to protection into an involuntary trustee subject to removal.

But the Civil Courts have no such discretion. Canon law determines who is the proper occupant of the Cathedral —here Metropolitan Benjamin—and the Civil Courts have no discretion to contradict the canon law and select another in his place.

Nor is there any need to wait until the actual exercise of such discretion before it can be challenged. The ruling that such discretion exists in the Civil Courts and the direction that it be exercised, are themselves challengable violations of the constitutional guarantee.

ii.

The majority lean heavily on *Kedrovsky* v. *Archbishop and Consistory of the Russian Catholic Church*, 249 N. Y. 75, to authorize the use of "discretion" to bar the appointed archbishop from the cathedral, but that case is irrelevant.

The findings there show that when Archbishop Evdokim left the United States in 1917, he transferred title to over 100 Russian *parish* churches to Alexander whom he later, irregularly, appointed as acting archbishop. Alexander used the assets of these parish churches to promote his private business enterprises. After a receiver was appointed, he also transferred the titles to a board of 5 men. Alexander's malfeasance was established and the lower court directed the titles to be conveyed, via the receiver, not to Kedrovsky, as the majority assert or imply (302 N. Y. at 13), but to a corporation, Archbishop and Consistory, on the theory that it was the "owner" thereof. The Court of Appeals reversed (249 N. Y. 75) on the ground that the Consistory corporation was not the "owner" of the legal titles and, since the titles were nominally in Alexander, who had been adjudged derelict, or in his grantees who took *pendente lite*, the Court remitted the case to the Trial Court to place the titles in the hands of others who would "more faithfully", that

is, more honestly than Alexander, hold the titles for the use of the respective parishes.[29]

St. Nicholas Cathedral was not one of the properties involved in the suit, nor was there any issue as to the undoubted right of the appointed archbishop to occupy it under canon law, and none of the *ecclesiastical* rights or prerogatives of Alexander, as archbishop, assuming he was one, were in any way affected or limited by the *Consistory* decision.

A Civil Court may have supervisory power over "trustees", but it cannot bar or interfere with the exercise by an archbishop of his ecclesiastic functions.

iii.

(a) The use of the *Kedrovsky* record as a basis of the decision against appellants violates due process.

Both majority opinions purport to base their decision against appellants on the "evidence in the records before us" (302 N. Y. at 21, 34). The reference is to the record here and to the *Kedrovsky* record which, it is asserted, was "submitted to us upon the argument" (302 N. Y. at 4). But the *Kedrovsky* record was not "submitted" to, nor was it properly "before" the Court below. Plaintiff's Exhibits 6A, 18 and 18A (dealing with Kedrovsky's appointment and the Sobor of 1923), were not printed here (189, 221, 54, 155) and it was stipulated that "with respect to Plaintiff's Exhibit 6A, 18 and 18A, the Court may be referred to copies of said exhibits appearing in the printed case on appeal" in the *Kedrovsky* case (251). Accordingly, on the argument below, appellee's counsel delivered to the Court for its convenience several copies of that record to enable the judges to have readily at hand the above 3 ex-

[29] Neither individually nor as archbishop did Kedrovsky claim these titles. He had no right to them. There is no requirement of canon law that the archbishop hold the *titles* to *parish* churches in his name. That is not one of his *ecclesiastical* functions.

hibits. Of course, the *Kedrovsky record* was not thereby "submitted" to, or placed "before" the Court, certainly not by appellants. Indeed, portions of that record which they had offered in evidence was, on appellee's objection, *excluded* by the trial court (97-98). The *Kedrovsky* record was *not* "submitted" to or "before" the Trial Court and it is not before this Court.

Nor is that all. The majority base their decision (302 N. Y. at 7-9) on the claims and that version of events (not contained in our record) which were offered by the *defeated* defendants in the *Kedrovsky* trial and *rejected* by the Appellate Division in that case which made *contrary* findings favorable to *Kedrovsky* (214 App. Div. at 489).[30]

In these circumstances, to base a decision adverse to appellants on the *Kedrovsky* record, which was used as part of the history of the Russian Church deemed "vital to our inquiry" (302 N. Y. at 4), is to deny them due process of law.

POINT V

The failure and refusal of the Court of Appeals to rule on the merits of the defense of limitations of appellant Benjamin, while directing final judgment against him, is a denial of due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

Even if the statute be upheld, the above contentions remain valid.

Appellant Benjamin pleaded the statute of limitations as an affirmative defense (4, 161) which, under state law,

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[30] Thus, by way of example, Judge Conway gives the text of a document of September 1923 (taken from the *Kedrovsky* record but not contained in our record) as proof that Platon was *appointed* Archbishop by the Patriarch (302 N. Y. at 9). But that document, which was alleged to be a forgery, had been *rejected* by the Appellate Division in that case (214 App. Div. at 485-6, aff'd 242 N. Y. 547).

(New York Civil Practice Act, Sec. 34), is 15 years. Title to the Cathedral was transferred to appellee on April 17th, 1925 (204). Its possession terminated April 2nd, 1926 (23-24). This action was commenced April 9th, 1945 (67). During these intervening 19 years it was continuously out of possession and made no attempt to recover the Cathedral (24, 160) which was held adversely by the Kedrovskys. Hence, the defense is valid on its face and this action is barred.

At the trial (67-8, 70, 78-80) and on their appeal in the courts below (where the parties devoted many pages of their brief to this issue), appellee's *sole* (68) contention was that the statute had been tolled, i.e. the "commencement" of this action in ejectment had been "stayed" (New York Civil Practice Act, Sec. 24) by two injunctions: (a) the permanent injunction in favor of Kedrovsky, as Archbishop, and against the two individual defendants in the *Kedrovsky* case, issued in 1926 and (b) an alleged *temporary* injunction, which it was claimed was granted, in July 1926, in an action, based on said permanent injunction, by Kedrovsky, as Archbishop, against appellee (70, 67). An unsigned, undated copy of this temporary injunction (189-190) was *excluded* by the trial court (80) and, by means of an affidavit of appellee's counsel, submitted after the trial, and which was also excluded (250-251), it attempted to show that such an injunction had been issued and to reconstruct its terms (189-190, 193-203, 248-249).

Appellant Benjamin contended at the trial and on both appeals, and on the motion for reargument, that these injunctions did not toll the statute.

Thus, appellee was not a party to the *Kedrovsky* case and the injunction there did not run against it (175-176). In any event, it enjoined only *physical* interference with Kedrovsky's possession (176) and did not, as appellee admitted, bar commencement of summary proceedings against Kedrovsky himself to recover possession of the Cathedral (249). Similarly it did not "stay" the "com-

mencement" of the ejectment action, i.e., service of a summons and complaint.

The alleged, excluded *temporary* injunction was, if issued, conditioned on an early trial (190) and terminated when the main action lapsed (67). Appellee's theory that the action "started and lapsed, but the injunction did not" (67) is hardly tenable. It also enjoined only physical interference (190), and, if it existed in the form asserted, it did not bar an ejectment action. Both injunctions ran against Kedrovsky, as archbishop (70, 176, 189).

The trial court, the Appellate Division, and the minority in the Court of Appeals did not pass on the defense of limitations, but, since they ruled in Benjamin's favor, it was unnecessary to do so. But when the Court of Appeals rendered final judgment *against* this appellant, it was bound to pass on his defense on the merits and its failure to do so in the original decision, and its refusal to do so on the motion for reargument, which specifically requested a ruling on this issue, is a denial of due process.

The Court of Appeals thus summarily dismissed appellant Benjamin's defense of limitations (302 N. Y. at 21):

> "Only the first (defense) need concern us here. The second, third and fourth defenses, i.e.: nonuser and lack of authority in plaintiff, the statute of limitations and laches, respectively, were either ignored, abandoned or found in plaintiff's favor. There was little or no discussion concerning them and they have been effectively eliminated from the case."

The above statement flatly contradicts the indisputable facts as to the defense of limitations. This defense was *not* "ignored, abandoned or found in plaintiff's favor". It was pleaded, it was litigated at the trial, it was pressed on the appeals to both courts below and the quoted statement is plainly mistaken.

Failure or refusal to pass on a properly raised defense, denies a defendant the right to defend and deprives him of a fair hearing, and thus denies him due process of law (*Morgan* v. *United States*, 298 U. S. 468, 480-1). In analagous cases it was deemed a denial of due process to deprive a party in a civil action of representation by counsel of his choice (*Roberts* v. *Anderson*, 66 Fed. (2d) 874, 6; cf. *Cooke* v. *U. S.*, 267 U. S. 517, 537 and *Powell* v. *Alabama*, 287 U. S. 45), or even, under certain circumstances, to bar oral argument at a hearing (*Federal Communications Commission* v. *W J R*, 337 U. S. 265, 273-277).

Conclusion

We respectfully submit that the judgment of the Court of Appeals employs a theory of decision dangerous to the administration of justice and nullifies basic constitutional liberties. It should be reversed with a direction that the judgment in favor of appellants be affirmed.

Respectfully submitted,

PHILIP ADLER,
Attorney for Appellants.

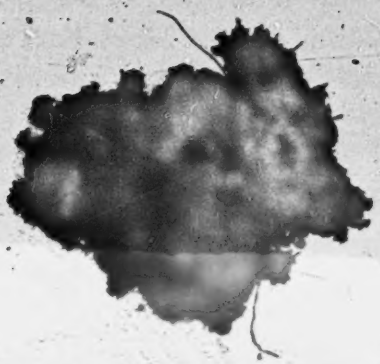

EXHIBIT A

ARTICLE 5-C (New)

Russian Orthodox Churches

Sec.

105. Definitions.

106. Incorporation of Russian Orthodox churches.

107. Government of incorporated Russian Orthodox churches; powers and duties of trustees.

108. Reincorporation of existing corporations.

Article added by L. 1945, c. 693, eff. April 10, 1945.

§ 105. Definitions

The "Russian Church in America", *as that term is used anywhere in this article, refers to* [is] that group of churches, cathedrals, chapels, congregations, societies, parishes, committees and other religious organizations of the Eastern Confession (Eastern Orthodox or Greek Catholic Church) which were known as (a) Russian American Mission of the Russian Orthodox Church from in or about seventeen hundred ninety-three to in or about eighteen hundred seventy; (b) Diocese of Alaska and the Aleutian Islands of the Russian Orthodox Church from in or about eighteen hundred seventy to in or about nineteen hundred four; (c) Diocese of North America and [Alaska] *the Aleutian Islands (or Alaska)* of the Russian Orthodox Church from in or about nineteen hundred four to in or about nineteen hundred twenty-four; and (d) Russian Orthodox Greek Catholic Church of North America since in or about nineteen hundred twenty-four; and were subject to the *administrative* jurisdiction of the Most Sacred *Governing* Synod in Moscow until in or about nineteen

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Explanation—The amendment of 1948 added the words in italics and omitted the words in brackets.

hundred seventeen, later the Patriarchate of Moscow, but now constitute an *administratively* autonomous metropolitan district *created* pursuant to resolutions adopted at a general convention (sobor) of said district held in Detroit, Michigan, on or about or between April second to fourth, nineteen hundred twenty-four.

A "Russian Orthodox [Church] church", *as that term is used anywhere in this article,* is a church, cathedral, chaptel, congregation, society, parish, committee or other religious organization founded and established for the purpose and with the intent of adhering to, and being subject to the *administrative* jurisdiction of *said mission, diocese or autonomous metropolitan district hereinabove defined as* the Russian Church in America. Added L. 1945, c. 693; amended L. 1948, c. 711, § 1, eff. March 31, 1948.

§ 106. Incorporation of Russian Orthodox Churches

An unincorporated Russian Orthodox church in this state may be incorporated by executing, acknowledging and filing a certificate of incorporation, stating the corporate name by which such church shall be known and the county, town, city or village where its principal place of worship is or is intended to be located. There shall be attached to such certificate the permission to incorporate signed by the metropolitan archbishop or other primate or hierarch of the Russian Church in America, or by the locum tenens acting in his place. Such certificate of incorporation shall be executed and acknowledged by six lay members of such church.

On filing such certificate such church shall be a corporation by the name stated in the certificate. Added L. 1945, c. 693, eff. April 10, 1945.

§ 107. Government of incorporated Russian Orthodox [Church] *churches;* powers and duties of trustees

1. Every Russian Orthodox church in this state, whether [heretofore or hereafter] incorporated *before or after the creation of said autonomous metropolitan district*, and whether incorporated or reincorporated pursuant to this article or any other article of the religious corporations law, or any general or private law, shall recognize and be and remain subject to the jurisdiction and authority of the general convention (sobor), metropolitan archbishop or other primate or hierarch, the council of bishops, the metropolitan council and other governing bodies and authorities of the Russian [Orthodox] Church in America, pursuant to the statutes for the government thereof adopted at a general convention (sobor) held in the city of New York on or about or between October fifth to eighth, nineteen hundred thirty-seven, and any amendments thereto and any other statutes or rules heretofore or hereafter adopted by a general convention (sobor) of the Russian [Orthodox] Church in America and shall in all other respects conform to, maintain and follow the faith, doctrine, ritual, communion, discipline, canon law, traditions and usages of the Eastern Confession (Eastern Orthodox or Greek Catholic Church).

2. The six lay members of every church incorporated pursuant to this article signing the certificate of incorporation and the rector shall be the trustees of such church for the first year or until their successors are selected according to the by-laws of such church or the rules and usages of the Russian [Orthodox] Church in America.

3. The trustees of every Russian Orthodox church shall have the custody and control of all temporalities and property, real and personal, belonging to such church and of the revenues therefrom and shall administer the same in accordance with the by-laws of such church, the normal statutes for parishes of the Russian [Orthodox] Church in America approved at a general convention (sobor) thereof held at Cleveland, Ohio, on or about or between November

twentieth to twenty-third, nineteen hundred thirty-four and any amendments thereto and all other rules, statutes, regulations and usages of the Russian Church in America. Added L. 1945, c. 693; amended L. 1948, c. 711 § 2, eff. March 31, 1948.

§ 108. Reincorporation of existing corporations

Any heretofore incorporated Russian Orthodox church may reincorporate under the provisions of this article, by filing in the office of the county clerk in the county in which its principal place of worship is located, a certificate, signed by the trustees in office at the time of such reincorporation, or by the majority of them, setting forth that they desire to reincorporate under the provisions of this article, the corporate name by which such church shall be known, the county, town, city or village where its principal place of worship is located and the number and the names of the trustees who are to hold office until the next annual meeting of said church. Immediately upon the filing of such certificate all the right, title, equity and interest of such church in any estate, real or personal, together with all franchise and charter rights, shall be vested in the body corporate and politic so created under this article and the original incorporation of such church shall be null and void. Added L. 1945, c. 693, eff. April 10, 1945.

APPENDIX B

In House Document #754, published by the United States Government in 1946, entitled "Communism in Action", which is described as "A Documentary Study and Analysis of Communism in Operation in the Soviet Union", prepared by the Legislative Reference Service of the Library of Congress, there is an instructive chapter on religion in the Soviet Union (pp. 127-132) which in no wise sustains the position of the majority. On the contrary, the impression created is a totally different one.

The pamphlet points out that "for an understanding of the position of religion in the Soviet Union of today, it is necessary to understand the background of religion under Tzardom" (p. 126), that, since the church was part of the state, "it was inevitable that the church should be the center of Bolshevik attack" (p. 126). Nevertheless, even in the darkest hours after the Revolution, "religious worship was never forbidden" (p. 127); and since 1938, "a drastic change has taken place in the attitude of the Soviet Government toward the church" (p. 128), and the Government acknowledged the failure of its anti-religious measures (p. 128).

The pamphlet continues:

> (p. 129) "The position of the church soon became defined as a 'useful and loyal element in society.' Soviet citizens were permitted to attend religious services freely, additional churches were opened, anti-religious propaganda ceased, godless publications were discontinued, and antireligious museums were closed. The Soviet's changed attitude toward religion was illustrated in 1942 during the strict wartime curfew in Moscow and other cities. On the night of the Eve of Easter Day, in spite of the grave risks involved, the curfew was lifted so that all who wished could attend the midnight services in the churches".

In addition, in 1945, approximately one-half of the property confiscated in 1923, including ancient shrines, were restored (p. 130), theological seminaries were reopened, and religious education and the publication of religious books were resumed (p. 130-1).

This study then proceeds as follows:

> (p. 131) "An important event in church affairs was the Orthodox Congress held in Moscow in January 1945, at which time Alexei was elected Patriarch to succeed Sergius whose death had occurred in May 1944. Several significant features of this Sobor are noted. The state was obviously ready to meet religious revival halfway. It was evident that the war years had allayed to a great extent the Soviet suspicion that the Church was mainly engaged in conspiring against the Government. Both the church and the Government realized that cooperation would benefit all concerned. Traditional formalities were observed with great care in convening the Congress. Participating in the ceremonies of consecration were Patriarchs, Metropolitans, and bishops from the Balkans, the Near East, and the Far East."

"Religion in Russia", (1946) Harper & Bros., by Prof. Casey, of Brown University, is to the same effect (pp. 178, 182-190). See also Bolshakoff, *The Christian Church and the Soviet State* (1942) MacMillan & Co., who states that Sunday is now a compulsory weekly holiday and absenteeism on religious holidays is allowed (p. 55).

N. S. Timasheff, who is Professor of Sociology at Fordham University in New York, in his recent book *"The Great Retreat"*, published in 1946 by Dutton & Co., points out that the Soviet antireligious propaganda failed, as the Soviet authorities themselves acknowledged (p. 227), and that the Soviet Government retreated from its initial anti-church and anti-religious position and accommodated itself to the existence of the church as a religious and social body. He concludes:

> (p. 237) "It is obvious that in 1944, the status of religion in the Communist State was entirely different from that of the year 1937-1938. The church is now an officially recognized social force."

Paul Anderson, in his book, *"People, Church and State in Modern Russia"*, from which plaintiff quotes the statement of Patriarch Sergius (plaintiff's Ex. 15-A, 207-8) and Stalin's statement (plaintiff's Ex. 15-B, 208-9), in no wise supports the claim of the majority (see the remarkable statement of the Russian Bishops at pp. 89-94). On the contrary, Mr. Anderson, writing in 1944, concludes:

> (p. 214) "The second reason for rejecting the idea of a state church is that the Orthodox Church itself, under its present leadership, sees too clearly the distinction between its God-given and God-directed purpose and the materialistic, albeit, humanitarian, character of the Soviet state, to willingly accept any formal State-Church or established church position. It desires to be, and feels itself to be, the Church of the Russian people, not the Church of the Soviet State."

Bolshakoff, *supra*, concludes:

> (p. 75) "The Church of Christ is eternal. It survived the Roman Empire, the dark ages, the disorders and tribulations of every kind, invasions, revolutions, wars. It Christianized the most unlikely societies and institutions. It may Christianize the Soviet State as well."

The majority stress the persecutions of the Patriarchal Church by the Soviets prior to 1927 (302 N. Y. at 6-8), but the survival of that Church attests to its vitality and indestructability. The trials of the Russian Church and its consequent evolution were by no means unique in Church history. They parallel the experience of the French Church (Phillips *"The Church in France, a Study in Revival,"*

pp. 7-19, 23-41; Walker, "*History of the Christian Church,*" p. 558). That church was also identified with the state and both suffered a common fate. "The tremendous storm of the French Revolution was about to break and to sweep away the church, with the nobility, the throne, and kindred ancient institutions" (Walker, *supra,* p. 558). The lands of the Church were confiscated, the religious orders were suppressed, the tithes were repealed, many of the clergy were executed, the survivors were converted into civil servants and the authority of the Pope over the Church was abolished (Phillips, *supra,* pp. 23-41). The aim of the revolutionary leaders was "the extinction of the Christian religion in general and of Catholicism in particular" (Phillips, *supra,* p. 12): "In 1793 the Jacobin leaders procured the abolition of Christianity" (Walker, *supra,* p. 558) and substituted in its stead the Goddess of Reason. And even when religious freedom was proclaimed, the state "was in reality strongly anti-christian" (Walker, *supra,* p. 558; Phillips, *supra,* pp. 23-41).

However, ancient forces reasserted themselves and within a generation the French Church resumed its vital position among the French people. What Phillips, *supra,* says of the French Church is equally applicable, we believe, to the Russian Church:

> (p. VII). "Just as in the case of the Roman Catholic propaganda in England under Elizabeth, it is hard to say how far the opposition (of the clergy) was inspired by religious, how far by political motives. Undoubtedly, both kinds of motives were present but the result in any case was persecution—the persecution of the Catholic religion as such. And persecution had its usual effect, *sanguis martyrum semen ecclesiae.* The Church of France, which had entered the revolutionary period, powerful but spiritually languid and in many ways corrupt, emerged from it poor indeed, but filled with moral and religious fervor long unknown."

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Supreme Court of the United States

October Term, 1951

No. 3

JOHN KEDROFF and BENJAMIN FEDCHENKOFF as Archbishop, etc.,

Appellants,

v.

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

REPLY BRIEF OF APPELLANTS

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49

SUBJECT INDEX

		PAGE
1.	Origin of the Cathedral	1
2.	The Statute as it is	3
3.	The Statute as Misread Below	4
4.	The Patriarchal Church	4
5.	The Cathedral and "Administrative Autonomy"	5
6.	Legal Concepts and Ecclesiastical Realities	6
7.	The Sobor of 1923—Secession—and Speeches	7
8.	Free Exercise of Religion is the Issue	7
9.	*Watson* v. *Jones*	8
10.	Alleged Demand for a Pledge of Loyalty	10
11.	Presumptions Unlimited	11
12.	The Post-Statute and Extra-Record Material Used By Appellee	12
13.	The State, the Church and Religion	13

Table of Cases

1.	*Trustees of Presbytery* v. *Westminster Church*, 305 N. Y. 222	8
		8

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Butts, R. Freeman: The American Tradition in Religion and Education (1950) 13, 14

Encyclopedia Brittanica: V. 3, p. 168 5

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No. 44

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REPLY BRIEF OF APPELLANTS

(Unless otherwise indicated numbers in parentheses refer to pages of the printed Record filed in this Court.)

The mass of detail which apepllee has accumulated in its massive brief should not be permitted to obscure the essential facts which are set forth in appellants' brief and which are in no way challenged, except with respect to the origin of St. Nicholas Cathedral, and here appellee is wholly in error as the record shows.

1. Origin of the Cathedral

The indisputable facts are that the land on which the edifice is built was acquired in 1899, the building was built in 1903, and was consecrated as a cathedral in 1905, and that the Church in Russia and the Russian Government supplied over $150,000 to build the Cathedral and contributed additional sums for its maintenance (164, 13, 14). Archbishop Leonty, appellee's witness, also testified that

"large sums of mony were sent by the Russian Church and Russian Government from Russia to acquire the land and build the cathedral" (14) and that he was "told" that "some money was raised in New York for the cathedral" (13). He also said (8):

> "Q. Well, would you tell his Honor briefly the history of the church and the Cathedral? A. The parish of Russian Orthodox Church in New York starts in 1893 as brotherhood and a small group, asking to build a church and have regular services. And after a while they collect money and start the bu...ing on the same place as Saint Nicholas Cathedral is now, about 1905. They started in 1903, and the church was consecrated in 1905, and was a parish church at that time. After transferring the Cathedral Episcopal from San Francisco to New York, Saint Nicholas Cathedral started as a Cathedral of Russia."

Appellee grossly perverts this testimony which in no way justifies its assertions that this brotherhood collected money "abroad", that the church in Russia and the Russian Government contributed substantial sums to it, that the Russian Ambassador and Consul General incorporated this parish brotherhood as the corporation which took title to the cathedral and that the cathedral was "acquired, built and consecrated a... a parish church" (its brief, p. 17). To what use the premises were put *prior* to the consecration of the cathedral in 1905 is of no consequence.

St. Nicholas Church became a cathedral, not by the will or vote of the clergy or worshippers of the diocese—they had no voice in the matter at all—but by the sacrament of consecration, performed by an accredited bishop by direction of Higher Authority. By virtue of this consecration, the catherdal was not dedicated to the worshippers of any parish or of the diocese but, under canon law, was reserved for the exclusive use of the appointed archbishop and it is undisputed that its occupancy or use by any other person would be a breach of canon law. It was the Patriarch and

not the worshippers who determined who was to be the archbishop and who was to occupy the cathedral. Even the *temporalities* of the cathedral were under the management of the archbishop and his Consistry, always subject "to the superior control of the Most Holy Synod at Petrograd, Russia" (235, 233). The assertion of appellee that the "beneficiaries" of the cathedral were the parishoners and then "automatically widened" to include all the worshippers of the diocese (its brief, pp. 55-6) is wholly arbitrary and is at variance with the facts and canon law.[1] The reference in the memorandum of the canonical experts of the metropolitan district to "St. Nicholas Cathedral in San Francisco, under the jurisdiction of Metropolitan Benjamin and through him the Moscow Patriarchate" (245) is equally applicable to St. Nicholas Cathedral in New York.

2. The Statute as it is

Under Article XV (secs. 290-295) and section 15 (subd. 3) of Article 2 of the Religious Corporations Law, passed in 1943, it was doubtful if a church affiliated with the metropolitan district, could incorporate without the approving certificate of the Federated Primary Orthodox Jurisdictions, and since the Patriarch's authorized archbishop was a member of this Federation, it was hardly likely that such certificate would be forthcoming. To remove this disability Article 5-C was passed, and it merely enabled churches of the metropolitan district to incorporate and thereafter to be governed by their own elected archbishop, without refer-

[1] Even so, the worshippers of the diocese, adhering to the Patriarch, even though they may be in the minority, may not be disregarded. This is not a matter for decision by a majority vote of the "beneficiaries". We are dealing with an hierarchal not a congregational church. The canon law controls, *i.e.*, the cathedral is subject to the jurisdiction of the Patriarch and his archbishop has the exclusive right to occupy it.

ence to the Primary Orthodox Jurisdictions. The 1945 statute does not operate as a transfer of patriarchal churches to the metropolitan district any more than the 1943 statute has the reverse effect. The construction by the majority below destroys the Federated Primary Orthodox Jurisdictions and repeals, by implication, the 1943 statute.

3. The Statute as Misread Below

Appellee concedes that the "compulsory mandate of the act applies only to religious corporations" established *prior* to 1924 [2] (its brief, p. 100). But if the Patriarch is a tool of the Soviet Government and the basic justification of the statute is the "likelihood" that the local churches might be used for Soviet propaganda (its brief, pp. 76, 77), why suppress only *incorporated* churches established *prior* to 1924 and spare all the rest, which may constitute the vast majority?

4. The Patriarchal Church

The Patriarchal Church survived every attempt of the Soviet government to destroy it. The full restoration of the patriarchal power and its canonical correctness cannot be questioned. The Appellate Division found that the metropolitan district itself recognized the Sobor of 1945 as authentic, negotiated with the Patriarchate for reunion and accepted the canonicity and reality of that church (276 App. Div. at 319). It is the only representative of all the Orthodox believers in the Soviet Union. That church is in full communion with all Eastern Churches and is in close association with the Anglican Church; indeed there have been discussions for a possible union between them. In 1948 the Patriarchal Church celebrated the 500th anniversary of its autocephaly at a conference in which the Eastern

[2] In such case, the statute also offends the guaranty of the equal protection of the laws.

Churches participated and where the representative of the Patriarch of Constantinople saluted the Russian Church and its Patriarch in terms of affection, referred to the "cordial ties" between the two churches, recalled that when the Russian church "had received, by divine grace, its autonomy, the Ecumenical Church of Constantinople sent to it * * * its wishes, full of blessing, on the occasion of that happy event" and joyfully participated in the decision of the Russian Church to celebrate the 500th year of its autocephaly. (Proceedings of the Conference, July 8-18, 1948, published in France in 1950, Volume I, pp. 17-18).[3]

In a study of the Soviet Union, published by the University of Notre Dame, and edited by Professor Gurian, Professor N. S. Timasheff of Fordham University, has a chapter on "Religion in Russia, 1941-1950" which, although critical in many respects, reveals the growth and power of the Patriarchate, which, considering its ordeals, is "almost incredible, perhaps miraculous" (p. 167).

5. The Cathedral and "Administrative Autonomy"

Appellee stresses the fact that the metropolitan district asserted merely "administrative autonomy" and not ecclesiastical independence (brief, pp. 81-83). The 1948 Amendment (sec. 105) speaks of the "*administratively* autonomous metropolitan district". It is hard to conceive just what the resulting relationship is, but passing that, the undisputed testimony is that one of the prerogatives of the archbishop accredited by the Patriarch is to officiate at

[3] A minor error is the observation of appellee (its brief, p. 10), that the autocephaly of the Russian Church followed the fall of Constantinople to the Turks in 1453. Actually it dates from 1448 and resulted from the union of the Patriarchate of Constantinople with the Pope at the Conference of Florence in 1439. Constantinople accepted and recognized this autocephaly. (Proceeding of Conference *supra*, pp. 10-13; 3 Encyclopedia Brittanica 168.)

services therein, to sit in the Bishops seat. It is conceded that if appellee prevails, Metropolitan Theophilus and not Metropolitan Benjamin, will conduct services in the Cathedral. Such use is not "administrative" in any sense, but purely "ecclesiastical", a use which, on its own theory, the metropolitan district cannot rightfully withhold from the Patriarchal archbishop. One may not profess to nourish the spirit and take away the house in which the spirit dwells. This is a dilemma inherent in the untenable position of the metropolitan district from which it cannot extricate itself. Furthermore, the Cathedral was never subject to the "administrative" control of the American Archdiocese but only to the "ecclesiastical" jurisdiction of the Holy Synod, then the Patriarch.

6. Legal Concepts and Ecclesiastical Relations

The ecclesiastical facts and the canon law should control the disposition of this case and the legal concepts of "trusties" and "beneficiaries," heavily laden with overtones of the civil law, should not be used to displace the canon law. The confusion resulting from the use of such inapposite concepts is revealed by Judge Conway's opinion. Thus, after asserting at the very outset that the cathedral was "dedicated to the use of all the members of the diocese," he states that "it is our duty in this action to identify the true and proper beneficiaries at the present time of such dedication of the cathedral" (253). If the cathedral was so dedicated that duty was discharged before its commencement and the rest of the opinion is an elaborate tautology. Later, Judge Conway considers that it was his duty to ascertain, not the "beneficiaries", but the "trustees" who could be relied on to administer "more faithfully" the cathedral trust (274). As a result, he transmutes the archbishop, Metropolitan Benjamin, into an involuntary "trustee" subject to removal—notwithstanding that he doesn't have "title". Such considera-

tions and concepts, we submit, are wholly foreign to the case. The relation between the Patriarch, his appointed archbishop, St. Nicholas Cathedral and the worshippers of the diocese, are to be stated solely in terms of church government and canon law, i.e., the cathedral is subject to the ecclesiastical jurisdiction of the Patriarch and, under canon law, may be occupied only by his appointed archbishop.

7. The Sobor of 1923—Secession—and Speeches

We fail to see the materiality of the extended discussion appellee devotes to these subjects. What happened in 1923 is hardly relevant now (163-164). Appellee says that the Renovated Church "is extinct today" (its brief, p. 13). Its failure attests to the vitality of the Patriarchal Church. Metropolitan Benjamin does not derive his authority as archbishop from the Sobor of 1923 but from his appointment by the Patriarch.

8. Free Exercise of Religion is the Issue

The issue here is not the right of possesion of a piece of realty or a business property, subject to local law, but the right to an *ecclesiastical* and *religious* use, required by canon law and nullified by civil command. The majority below did not decide the case on the basis of any rule of real property law or ejectment; they expressly ruled on appellants' rights under the First Amendment (298). They ruled that the civil power could and did enter this religious controversy and decided that, notwithstanding the canon law, a local group of churches should have the ecclesiastical use of the cathedral instead of the central church which, by custom and canon law, had the ecclesiastical use prior to the statute and from the origin of the cathedral. Thus, they defined the issue to be whether "Benjamin, the appointee of the central church authorities in Moscow, or Metropolitan Theophilus, the Archbishop of the North

American Metropolitan District, was the proper person * * * or the proper trustee" who would "more faithfully" administer the Cathedral (274) and they found or read into the statute a legislative "determination" that the metropolitan district was the more "faithful" trustee (281). Appellants contend, of course, that such action by the legislature or the Courts is prohibited. The question is not which "trustee" is more "faithful" (the civil power cannot decide that issue), but what the canon law says. Occupancy of the Cathedral by the appointed archbishop—to officiate there and sit in the Bishop's seat—is an exercise of religion and a statute that forbids this must fall before the First Amendment.

9. *Watson* v. *Jones*

(a) The rule that matters of "church discipline" and "ecclesiastical government" are not subject to civil jurisdiction (p. 733) and that the decisions of the chief authorities of a church respecting any matters of church "law", "discipline" or "government" (727) are "final" and "conclusive", necessarily stems from the constitutional principle of separation of church and state. If the civil authority has the power to disregard the rules of church government and discipline, and impose on a church other rules, the civil power prohibits the "free exercise" of religion in accordance with the dicipline of the church.

(b) *Watson* v. *Jones*, without disturbing the marshal's possession, enjoined interference with the *ecclesiastical* functions of the plaintiff, as *pastor* of the church and declared that the trustees of the incorporated church were only the nominal holders—actually the custodians—of the legal title, and, in the use of the church for *ecclesiastical* purposes, the trustees were subject to the supreme church authorities (at 720-1). To the same effect is *Trustees of Presbytery* v. *Westminister Church*, 305 N. Y. 222, where the Court permitted a seceding corporate church to retain

its "naked" title but required it to hold the church subject to the "discipline and laws" of the Presbyterian Church at large (at 321).

(c) When the original corporation was organized in 1899, of which the Russian Ambassador and the Consul General were the trustees, and when the Cathedral was consecrated in 1905, it became subject to the denominational control of the "ecclesiatical governing body" to which the corporation was subject (Rel. Corps. L. Sec. 5), *i.e.*, the Holy Synod, and later the Patriarch. (This would have been the case in any event under canon law.) The trustees were thereafter powerless to withdraw the Cathedral from this juriadiction.

Appellee's contention in Point II (its brief, pp. 86-96), is based on a fallacy. Assuming the state may or may not provide denominational control over corporations, it does not follow that the state may take a church subject to one ecclesiastical jurisdiction and transfer it to another. That is what the statute does here.

The fact that the record title is now held by a corporation is a fortuitous circumstance and should not affect the merits of the case. The ecclesiastical issue would be the same, if the title were in an individual, such as the archbishop, as it was during 1916 and 1917.

(d) It is true that in a particular case a Court determines whether a particular church is subject to this or that denomination. But in such a case the Court does not determine who is the better or more faithful trustee, but applies the canon law as determined by the chief authorities of the church. This is what this Court did in *Watson* v. *Jones*. This is required by the separation principle. Application of a rule contrary to canon law would violate the separation principle. That same principle bars statutory nullification of the canon law.

10. The Alleged Demand for a Pledge of Loyalty

On page 33 of its brief, appellee says: "*'Loyalty' to the Soviet government was required by Metropolitan Sergius from all of the clergy abroad* (R. 113-114).. By 'loyalty' was meant refraining from criticism of the Soviet regime either in the pulpit or in the name of the church" (italics in original). This limitation renders unfair and misleading the use of the term "loyalty" to describe the policy of the Patriarch. Appellants protested against such abuse of terms (122-123):

> "Excuse me. There is no evidence there was any pledge of loyalty. It is a question of agitation in the churches against the government.
>
> Mr. Arkush: When I say a 'pledge of loyalty' I mean that pledge which his Eminence has testified to.
>
> A. Loyalty is understood as refraining from politics only * * *. Both in the church and in the name of the church".[4]

Nevertheless, appellee's brief asserts with repetitive emphasis that there was a demand of loyalty to the Soviet government without indicating, except in rare instances, the limitation noted above.

In our main brief (pp. 12, 30-33) we have shown that the evidence does not sustain appellee's claim.

The pronouncement of Metropolitan Sergius in 1927 (207-208), the proffer of settlement in 1945 by Patriarch Alexy (227-228), the testimony of Metropolitan Benjamin (112-126), the testimony of Metropolitan Gregory that the church "is functioning freely as an orthodox church, without interference by the civil authorities" (167), the

[4] The foregoing, in our view, epitomizes Metropolitan Benjamin's testimony (112-126), which does not sustain appellee's claim that he demanded that the local clergy pledge loyalty to the Soviet government (its brief, p. 35).

statement by the Patriarch in 1943 that the Patriarchal Church "has kept unsullied its canonical consciousness * * * and it correct and canonical supreme direction" (102-103), the acceptance of this truth by the canonical experts of the metropolitan district (242-247), the resolution of the membership of the metropolitan district in 1946 to request the Patriarch "to continue us in his fold and be our spiritual head" (222), the admonition of the metropolitan district to its clergy "not to touch upon political questions * * * especially from the pulpit" (216)—all this shows that there was no demand for a pledge of "loyalty" to the Soviet government, that the policy of keeping the local church here, *qua* church, "in church and in the name of the church", out of politics, was not a bar to reunion, and that the negotiations for a setlement foundered, not on the spurious issue of "loyalty" but, as the Appellate Division found, on the purely ecclesiastical question as to the scope of the patriarchal power to confirm locally elected bishops (276 App. Div. 319-320). The metropolitan district sought to withhold from the Patriarch what is had readily given to the Karlovitz Synod.

The loyalty issue is a red herring.

11. Presumptions Unlimited

Although presumptions have no value in an issue such as this, appellee's fundamental position is based on a network of presumptions, none of which has any basis in fact, namely, the presumption that the statutes made findings that the Patriarch is a tool of the Soviet government, that there was a "likelihood" that the local churches might be used for Soviet propoganda, that the metropolitan district is identical with the American Archdiocese, that the churches which did not participate in the Detroit convention nevertheless consented to the autonomy, that the metropolitan district was the proper "trustee" who could administer "more faithfully" than the Patriarch the local Russian Churches.

There is nothing whatever to show that the legislature had any of these things in mind. They are constructions of counsel's mind.

12. The Post-Statute and Extra-Record Material Used by Appellee

Appellee incorporates in Appendix C of its brief some material which appeared in the Journal of the Patriarchate from March to December, 1950. It acknowledges the incongruity of claiming that a statute, passed in 1945, was based upon or was influenced by something published five years later. It nevertheless seeks to justify its use by the claim that, if we are to "presume" that the statute made a "finding" that there was a "likelihood" that the local Russian churches would be used as instruments of Soviet propaganda, then this material lends confirmation to this presumed and prophetic finding (its brief, pp. 76-77). With respect to the *legal* effect this material should have, we observe:

(a) The pronouncements of the Patriarch, like those of the Pope, are binding on the faithful only when they deal with matters of faith (and perhaps morals) when uttered *ex-Cathedra*. All other utterances—and those appearing in Appendix C fall within this category—do not bind the faithful. An Orthodox Christian may differ with his Patriarch on matters of politics, economics, etc.

(b) No evidence of any kind has been offered that the Patriarchal Church in New York or any of its local clergy or members have said or done anything in obedience to or conformity with the views set forth in Appendix C.

(c) The views of the Patriarch or the editors of the Journal, however erroneous they may be and however unacceptable they are here, do not furnish constitutional justification for the suppression of the Patriarchal Church, particularly its *incorporated* churches established *prior*

to 1924. The state cannot punish a local branch of an international Christian society because it disagrees with the political views of the head of the Church. For the same reason the State of New York could not have punished the metropolitan district because, during the war and up to 1946, it had been subject to the jurisdiction of the Karlovitz Synod, which had been compromised with Hitler.

Often a Church, to protect its long range interests, may find it necessary to operate on the principle of the lesser evil. Professor Timasheff, *supra*, suggests that certain actions of the Patriarchate may be explained on that ground (191). To an unfriendly eye a Church may sometime appear to be nearer earth than heaven. But criticism may well be hasty and premature. Even if the state take an uncharitable view of the actions of a church at a given time, nevertheless, unless there be clear and present danger to the safety of the state, the free exercise of religion by that Church, its ecclesiastics and members, may not be prohibited or abridged.

13. The State, the Church and Religion

The Tudor state not only established the Anglican Church but determined its internal government, appointed its bishops, convened its religious assemblies, fixed its creed, compelled attendance at its church, enacted compulsory tithes, prohibited all non-conformity, outlawed the jurisdiction of the Pope and made any ecclesiastical deviation a civil offense. The individual had to adopt the religion and the church of the sovereign; *cujus regio, ejus religio*, was the principle. (Butt, *The American Tradition in Religion and Education* (1950), pp. 14-15; Greene, *Religion and the State* (1941), pp. 1-23.)

The same or similar religious practices were transplanted to the early colonies. In Virginia the Anglican Church was established; in Massachusetts the Puritans founded their Bible Society along Calvinistic theocratic

lines. The other colonies varied in their religious practices between these two extremes, except Rhode Island, which was founded as "a shelter for persons distressed for conscience." (Greene, *supra*, pp. 23-47; Butts, *supra*, pp. 15-20.)

The First Amendment repudiated the theory and practice of the state-church relationship of the Tudor Leviathan state. Religion and its exercise was a matter of *personal*, not state concern. Churches, their government and their ecclesiastical affiliations, were beyond the reach of the civil power. A church was an autonomous voluntary society which government could not control. Church and religion were a sanctuary which the state could not enter.

The vice of the statute, as construed and applied here, is that it resurrects the power of the state over churches and religion, exercised by the Tudor state in the past and by the totalitarian states at the present time. Fear of Catholicism prompted the suppression of the Catholic Church in Tudor England, fear of democracy prompts the totalitarians of today to suppress churches having western affiliations, and the "likelihood" of Soviet propaganda is offered here as justification for the suppression of the Patriarchal Church—or an insignificant segment of it. But a society such as ours, living under the First Amendment, cannot emulate the totalitarians. It is one of the tragedies of our times that the totalitarian states do not have a Bill of Rights such as we have.

The Orthodox Church, like the Roman Catholic Church, is by its nature a universal society and transcends national boundaries. Under the First Amendment the state has no power to break up into local units—to domesticate—such an international religious society.

It would *not* be a national misfortune, as appellee somewhat heatedly puts it (its brief, p. 5), if this single building, this consecrated cathedral, were to remain in the

raditional jurisdiction of the Patriarch, but, we submit, would be a misfortune if, in order to take this Cathedral ut of his hands, the First Amendment should be sacrificed.

The judgment should be reversed.

Respectfully submitted,

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49

INDEX

PAGE

Appellants' Position 1

Statement of Jurisdiction 3

The Statute Involved 4

Statement of the Case 5

The Nature of the Action 5

The Opinions Below 7

The Nature of the Russian Orthodox Church 11

The Government of the Russian Orthodox Church 12

The American Archdiocese 13

The Government of the American Archdiocese .. 14

Relation Between the American Archdiocese and the Church at Large 14

Saint Nicholas Cathedral 15

The Metropolitan District 18

Negotiations Between the Patriarch and Metropolitan Theophilus 20

Specification of Errors 23

The Constitutional Issues Presented 24

Summary of the Argument 24

POINT I—The statute, as construed and applied by the Court of Appeals, constitutes an abridgement of freedom of religion guaranteed by the First Amendment to the United States Constitution made applicable to the states by the Fourteenth .. 27

A. The First Amendment withdraws from the civil power the entire field of religion and particularly the internal government of all religious societies 27

The Western Medieval Theory—Theocracy 27

PAGE

The Protestant Theory—Erastianism 28

Orthodox Caesaro—Papism 29

Church and State in the Colonies 30

The Separation Principle 30

B. The statute, by directing the transfer of St. Nicholas Cathedral from the jurisdiction of the Patriarch to that of a locally elected archbishop, and by compelling the ouster of the Patriarchal archbishop from the Cathedral which is reserved for his exclusive use by canon law, interferes in the internal affairs of the Russian Church, prohibits the free exercise of religion by that Church, and violates the constitutional guarantee of religious liberty 33

C. There is no constitutional justification for the statute 35

1. The statute cannot survive the clear and present danger test 35

2. The proffered justification for the statute, viz., that the Patriachate is not a "true" Church, is inadmissible 36

3. There was no demand for a "pledge of loyalty" by the clergy *abroad* to the Soviet State 36

4. The alleged "pledge of loyalty" by Patriarch Sergius to the Soviet State in 1927 does not show that the Patriarchate is not a "true" Church 37

5. The "contradiction" between the Russian Church and the Soviet State 39

6. There is no evidence whatever in the record that the Patriarchate is not a "true" Church 40

PAGE

7. The illegitimate use of Judicial Notice 41

8. The illegitimate use of presumption 42

9. Reductio ad absurdum 44

10. The alleged status of the Patriarchate cannot justify restraints on religious liberty 45

POINT II—The statute, as construed and applied by the Court of Appeals, is a taking of property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution 45

POINT III—The ruling by the Court of Appeals that the Trial Court has "discretion" to determine whether appellant Benjamin is the "proper person" or "proper trustee" to occupy St. Nicholas Cathedral, violates the guarantee of religious freedom 46

a) The "discretion" theory of the majority, if applied to this case, is unconstitutional 47

b) The role of title in the case 50

POINT IV—This Court has jurisdiction of the appeal. A Federal question was involved and necessarily decided. The judgment does not rest and cannot be sustained on state grounds beyond the power of this Court to review 51

a) This Court has jurisdiction to review the facts 57

POINT V—The judgment violates procedural due process 58

Conclusion 61

APPENDIX A—Article 5-C of Religious Corporations Law of the State of New York 63

APPENDIX B—Statement of the Russian Bishops 67

Table of Cases Cited

	PAGE
Angelos v. Meserich, 289 N. Y. 498	52
Abie State Bank v. Bryan, 282 U. S. 765	55, 56
Backus v. Fort Street Union Depot, 169 U. S. 557	46
Brinkerhoff v. Hill, 281 U. S. 673	46
Busey v. District of Columbia, 138 Fed (2) 592	44
Carrier v. Carrier, 226 N. Y. 114	48
Chicago, B. & O. R. R. Co. v. Chicago, 166 U. S. 226	46
Cincinnati St. R. R. Co. v. Snell, 179 U. S. 398	47
Cincinnati etc. Packet Co. v. Bay, 200 U. S. 179	54
Cresswell v. Grand Lodge, Knights of Pythias, 225 U. S. 246	57
Dixon v. Duffy, 342 U. S. 33	54
Enterprise Irrigation District v. Farmer's Mutual Canal Co., 243 U. S. 157	56
Everson v. Board of Education, 330 U. S. 1	31
Federal Communications Commission v. W. J. R., 337 U. S. 265	59
Feiner v. United States, 340 U. S. 315	57
Fiske v. Kansas, 274 U. S. 380	57
Flournoy v. Wiener, 321 U. S. 253	3
Grayson v. Harris, 267 U. S. 352	56
Hammerstein v. Superior Court, 340 U. S. 622	54
Hedgebeth v. Northcawler, 334 U. S. 806	55
Herb v. Pitcairn, 324 U. S. 117	54, 55
Indiana v. Brand, 303 U. S. 95	54, 56
International Shoe and Iron Co. v. National Surety Co., 297 U. S. 657	56
Jennings v. Illinois, 342 U. S. 104	54

PAGE

Kedrovsky v. Rojdesvensky, 214 App. Div. 483, aff'd 242 N. Y. 547 ..... 6, 7, 16, 49, 59
Kedrovsky v. Archbishop and Consistory, 249 N. Y. 75 47
Laclede Gas Light Co. v. Public Service Comm., 304 U. S. 398 47

Lawrence v. State Tax Commission, 286 U. S. 276 ..... 55, 56
Loftus v. Illinois, 334 U. S. 804 54

Marsh v. Alabama, 326 U. S. 501 ..... 35, 49
Marvin v. Trout, 199 U. S. 212 54
Matter of Droege, 197 N. Y. 44 52
Meyers v. Nebraska, 262 U. S. 390 32

Near v. Minnesota, 283 U. S. 697 34
Niemotko v. United States, 340 U. S. 268 57

Perkins v. Benguet Consolidated Mining Co., 342 U. S. 437 ..... 54, 55
Phyle v. Duffy, 334 U. S. 431 55
Prince v. Massachusetts, 321 U. S. 158 ..... 32, 44
Prudential Ins. Co. v. Cheek, 259 U. S. 530 3

Rochin v. California, 342 U. S. 165 59

Shelley v. Kraemer, 334 U. S. 1 ..... 35, 46, 49
State Tax Commission v. Van Cott, 306 U. S. 511 ..... 54, 56
Sterling v. Constantin, 287 U. S. 378 57

Terre Haute etc. Railroad Co. v. Indiana, 194 U. S. 579 ..... 33, 55
Thomas v. Collins, 323 U. S. 516 ..... 2, 43
Trustees of Presbytery v. Westminster Church, 222 N. Y. 305 15

Union Pacific RR. v. Public Service Comm., 248 U. S. 67 ..... 55, 57
United States v. Carolene Products Co., 304 U. S. 144 43

PAGE

Villa v. Van Schaick, 299 U. S. 152 54

Ward v. Board of Community Consumers, 253 U. S. 17 55

Watson v. Jones, 13 Wall 679 ..... 7, 8, 10, 15, 31, 32, 49, 50, 51, 52, 53

Watts v. Indiana, 338 U. S. 49 57

West Virginia School Board of Education v. Barnette, 319 U. S. 624 ..... 2, 32, 43

Whitney v. California, 274 U. S. 357 54

Williams v. Kaiser, 323 U. S. 471 56

Woods v. Nierstheimer, 328 U. S. 211 55

Constitution and Statutes

Constitution of the United States:

First and Fourteenth Amendments 4, 27

United States Code, Title 28:

Secs. 1257, 2103 3

Religious Corporations Law of the State of New York:

Art. 5-C 4, 63

Art. XV and Sec. 15 of Art. 2 11

Civil Practice Act of the State of New York:

Sec. 605 ..... 42, 52

Sec. 584 52

Sec. 24 58

Sec. 34 58

Works of Reference

PAGE

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Italy Today 39

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Supreme Court of the United States

October Term, 1952

No. 3

JOHN KEDROFF and BENJAMIN FEDCHENKOFF, as Archbishop, etc.,

Appellants,

v.

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA,

Appellee.

BRIEF FOR APPELLANTS ON REARGUMENT

This appeal by defendants from a judgment of the Court of Appeals of the State of New York was argued in this Court on February 1, 1952, and on June 9, 1952, this Court entered the following order (343 U. S. 972):

> "This case is ordered restored to the docket for reargument. In view of the opinion, concurring opinion, dissent, judgment and remittitur of the Court of Appeals of New York concerning the status of the Patriarchate in Russia, counsel are requested to include in their presentation a discussion of whether the judgment may be sustained on state grounds."

Pursuant to that order, appellants are here to reargue the cause.

Appellants' Position

The canon law of the Russian Church says that the archbishop appointed by the Patriarch has the exclusive right to occupy Saint Nicholas Cathedral, to sit in the bishop's

seat and to conduct religious services there and that occupancy or use of the Cathedral by any other person would be a breach of the canon law.

Notwithstanding this, indeed, in open defiance of the canon law, the judgment below ejects from the Cathedral the archbishop so appointed, evicts him from the bishop's seat, and bars him from conducting religious services in the Cathedral and exercising there the canonical prerogatives of his office; that is to say, it prohibits the free exercise of his religion by the canonical archbishop.

This judgment thus collides squarely with the First Amendment and, since that Amendment binds every agency of government, including the courts, it matters not at all that the judgment is based on a statute, as here, or on some rule of common law; indeed, such a judgment having such a result, cannot possibly rest on local state law beyond the power of this Court to review and correct on constitutional grounds.

Restraint on the free exercise of religion, if permissible at all, may be justified only by the clear and present danger test,[1] and since occupancy of the Cathedral by the canonical archbishop can in no wise constitute a menace to the state, there must be a reversal of the judgment below, for it is clear beyond question that occupancy of the Cathedral by the appointed archbishop, under canon law, is an exercise of religion which, under the First Amendment, neither the legislature nor the courts can prohibit or restrict.

---

[1] *West Virginia School Board of Education* v. *Barnette* (319 U. S. 624); *Thomas* v. *Collins* (323 U. S. 516). In the first case this Court said that the freedoms of the First Amendment, including religious freedom, "are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect" (at 639), and in the second that "any attempt to restrict these liberties must be justified * * * by clear and present danger" to the public interest (at 530).

As the *sole* justification for the judgment we are given the postulate that, because the Patriarchate pledged "loyalty" to the Soviet government, it is not a "true" Church but a "tool" (284)[2] of that government. Such a pledge, as we shall see, is required by Christian tradition, but, in any event, this postulate, even if it be not wholly baseless and arbitrary (see pp. 36-45, *infra*), cannot save the judgment from condemnation, for there is nothing in the Constitution or any perceptible radiation from it, which justifies a restraint on the free exercise of religion on such a ground or theory.

Statement of Jurisdiction

This is an appeal from a judgment of the Court of Appeals of the State of New York which sustained the validity of Article 5-C of the Religious Corporations Law of that state against the claim that, as construed and applied, it was repugnant to the First and Fourteenth Amendments to the United States Constitution. This Court has jurisdiction of the appeal under Title 28, U. S. C., sec. 1257, and of the non-appealable issues, set forth in the assignment of errors, under sec. 2103 of Title 28 (*Flournoy* v. *Wiener*, 321 U. S. 253, 263; *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530, 547).

The judgment was rendered on November 30, 1950. A timely motion for reargument was made on January 12, 1951 and was denied by the state court on March 9, 1951 (298). The appeal was allowed on April 11, 1951 and this Court noted probable jurisdiction on June 4, 1951 (299, 304). The appeal was argued here on February 1, 1952 and on June 9, 1952 this Court ordered reargument.

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[2] Unless otherwise indicated numbers in parentheses refer to pages of the printed case on appeal filed in this Court.

Appellants' motion for reargument was denied by the Court of Appeals in the following memorandum (298):

> "Motion for reargument denied. Motion to amend the remittitur granted * * *.
>
> Upon this appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz: whether Article 5-C of the Religious Corporations Law, as construed by this Court, violated any rights of the defendants guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. This Court held that the aforesaid statute did not violate any of the rights of the defendants guaranteed by those amendments to the Constitution of the United States."

The Statute Involved

The statute is Article 5-C of the Religious Corporations Law of the State of New York (Laws of 1945, ch. 693, as amended by Laws of 1948, ch. 711; Vol. 50, McKinney's Consolidated Laws of New York). Its full text is set forth in Appendix A annexed hereto. In substance:

(a) It defines a group of churches as a separate and autonomous religious body called the "Russian Church in America". Until April 1924, this group of churches had belonged to a larger group constituting, under successive names, the American Diocese of the Russian Orthodox Church, and had theretofore been subject to the jurisdiction of the Most Sacred Governing Synod in Moscow and later the Patriarch of Moscow. In April 1924, at a convention in Detroit, this group of churches constituted themselves an "administratively autonomous metropolitan district", and thus seceded from the American Diocese and from the Russian Orthodox Church to which the American Diocese remained subject (sec. 105).

(b) It defines a "Russian Orthodox Church" as a church, "founded and established for the purpose

and with the intent of adhering to, and being subject to the administrative jurisdiction of said mission, diocese or autonomous metropolitan district hereinabove defined as the Russian Church in America".

(c) It provides for the government of incorporated Russian Orthodox Churches (as above defined). It directs that "every" Russian Orthodox church in the State of New York, no matter when incorporated, "shall recognize and be and remain subject to the jurisdiction and authority of the * * * metropolitan archbishop or other primate or hierarch * * * of the Russian Church in America" (sec. 107(1)). And it gives to the trustees of every such Russian Orthodox church "the custody and control" of all its temporalities and property, and requires them to "administer" the same "in accordance with the rules and statutes * * * of the Russian Church in America" (sec. 107(3)).

STATEMENT OF THE CASE

The Nature of the Action

The action in form is one in ejectment by appellee, a New York corporation, which holds the nominal legal title to the premises and is brought on behalf of the metropolitan district and its elected archbishop. "This is not, however, the ordinary ejectment action," said Judge Conway for the majority (270), and they decided the case on the issue whether the patriarchally appointed or the locally elected archbishop has the right to occupy the Cathedral (274).

The complaint alleged that appellee was a New York corporation, that it was seized in fee of the described premises, where Saint Nicholas Cathedral was located, and that it was entitled to immediate possession thereof, which was wrongly withheld from it (1).

Appellants denied the material allegations of the complaint (2) and appellant Benjamin alleged, as an affirma-

tive defense, that, under the canon law of the Russian Church, Saint Nicholas Cathedral was reserved for the exclusive use of the archbishop appointed by the Supreme Church Authority, to wit the Patriarch, that he was such appointed archbishop, and under canon law, he was entitled to the exclusive possession of the Cathedral (3-4).

Appellant Kedroff's right to remain in the Cathedral derives from the consent of the appointed archbishop.

The identical issue was raised and decided, before Article 5-C was passed, in favor of the appointed archbishop in *Kedrovsky* v. *Rojdesvensky* (214 App. Div. 483, aff'd 242 N. Y. 547). There the action took the form of a suit by the appointed archbishop for an injunction to restrain Platon Rojdesvensky, who had been elected archbishop of the metropolitan district, from occupying Saint Nicholas Cathedral (literally to eject him), on the ground that Platon was *not* the appointed archbishop and that his occupancy was a deviation from the ecclesiastical use to which, under canon law, the Cathedral had been consecrated. Both parties there relied on the undoubted rule of canon law that the centrally appointed archbishop had the exclusive right to occupy the Cathedral and each claimed to be such appointee. Platon's claim to the Cathedral on the ground of appointment was rejected as matter of fact and his claim on the ground of local election was rejected as matter of canon law. There, too, the claim was made that the Sobor of 1923, which had appointed Kedrovsky, had been subverted by the Soviets but, said the Court, to award the Cathedral to Platon "on the theory that the doctrinal necessities of the Russian Church require it, would put a civil tribunal of New York in ascendancy over the ecclesiastical authority in the decision of a purely ecclesiastical question with which it can have no concern" (214 App. Div. at 489)—that is to say, it would be unconstitutional.

The Opinions Below

The trial judge sustained Metropolitan Benjamin's defense, held in favor of the appointed archbishop on the authority of *Watson* v. *Jones* (13 Wall 679) and the *Kedrovsky* case, *supra*, and ruled that Article 5-C had no application to the case (192 Misc. 387).

The Appellate Division affirmed by a vote of three to two (276 App. Div. 309), the majority holding that, if it were construed in a contrary sense, the statute would unlawfully interfere in the internal affairs of the Church, in violation of the First Amendment and the principle of separation of Church and State therein embodied. As the ultimate authority on the facts, the majority affirmed the findings of the trial court that appellant Benjamin was the archbishop canonically appointed by the Patriarch and, under canon law, was entitled to the exclusive possession of the Cathedral. Answering the contention of the dissent in that court, that the Patriarchate was not a "true" Church but a mere instrumentality of the Soviet government, the majority said that this was a "position which we find the plaintiff does not contend for", that this is not a matter appropriate for judicial notice and that the record facts were to the contrary (276 App. Div. at 318-319).

The Court of Appeals reversed by a vote of four to three. There was a "prevailing" opinion by Judge Conway, a "concurring" opinion by Judge Froessel and a minority opinion by Judge Desmond, in which Chief Judge Loughran and Judge Fuld concurred.

Judge Conway pointed out that Article 5-C was amended in 1948 specifically to overcome the decision of the trial court (278-9), that the statute, as amended, had a "conclusive" effect on the litigation (271) and, accordingly, he reversed and gave final judgment to appellee on the ground that the "plaintiff corporation and the autonomous metropolitan district which it represents, must prevail in this action *in accordance with the legislative finding and*

mandate and be reinvested with the possession and administration of the temporalities of St. Nicholas Cathedral" (284, italics added).

The final judgment from which this appeal is taken is thus clearly based on the statute—the legislative mandate.

Judge Conway also discussed the rights of the parties on common law lines and he developed a theory, wholly unprecedented, erroneous and unconstitutional, which cast the archbishop in the role of "trustee" of the Cathedral and invested the civil courts with the discretionary power to determine (irrespective of what the canon law said) whether the patriarchally appointed or the locally elected archbishop would be the more "faithful trustee" of the Cathedral.

Judge Conway acknowledged, however, that the trial courts did not adopt his theory but followed instead the principles of *Watson* v. *Jones* and enforced the canon law of the Church, which reserved the Cathedral for the exclusive use of the appointed archbishop (273-4). He ruled that this was error and added that "Our views on this aspect of the controversy would require reversal and the *ordering of a new trial* so that the (State) Supreme Court might exercise its discretion along the lines here indicated" (274, italics added).

The "lines here indicated", under his theory, meant this: the civil court may remove a "faithless", that is, a dishonest trustee and appoint another in his place. The archbishop is the "trustee" of the Cathedral. If the Patriarchate is not a "true" Church, the civil courts may, in their discretion, remove its appointed archbishop from the Cathedral and select a more "faithful trustee" in his place. Accordingly, on the new trial, the trial court should make full inquiry as to the status of the Patriarchate and its relation to the Soviet government and explore the issue whether the appointed or the locally elected archbishop

would be the more "faithful trustee" of the Cathedral.[3]

However, Judge Conway found it "unnecessary" to discuss this "aspect of the case further" (274), i.e. whether he should order a new trial, because, as he said, there is another ground requiring reversal—not to order a new trial—but to direct final judgment in favor of appellee (275), viz., the "conclusive" legislative "mandate", i.e. the statute.

Judge Conway's discussion of his common law theory was in reality *obiter*, and merely a prelude to his theory supporting the constitutionality of the statute. For, notwithstanding that the statute contains no declaration of policy or findings of fact, and was passed without any hearings or committee reports, and without a vestige of justification, he reads his common law theory into the statute by "presumption" and discovers there (what he himself put there in the first place) a legislative "determination" that the Patriarchate is not a "true" Church but a "tool" of the Soviet government, and a legislative "mandate" that, for that reason, the Patriarchal Church be suppressed, the Cathedral taken from it and transferred to the metropolitan district (281, 283, 284). All this, of course, is pure fancy, for no such "determination" is to be found anywhere in the statute.

Whatever obscurity may exist as to the grounds of Judge Froessel's "concurring" opinion, is dissipated by his reference to the facts "as found by the legislature" (285), by his double reference to Judge Conway's opinion

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[3] Although he characterized as "determinative" (272) his postulate that the Patriarchate is not a "true" Church, Judge Conway acknowledged its factual infirmity and said that "further inquiry might well have been made (at the trial) into the present status of the Patriarchate in Russia" (274). And of course, on the new trial, appellants would have full opportunity to develop at length what they did only incidentally, because the issue was not raised at the trial, viz., establish the falsity of the claim that the Patriarchate is not a "true" Church.

as the "prevailing opinion" (285, 286), and his concurrence therein (286). This means that, if the case had been decided on common law grounds, a new trial would have been ordered; but, since it was decided on the basis of the statute, final judgment in favor of appellee was awarded, without ordering a new trial, in accordance "with the legislative finding and mandate" (284).

Judge Desmond's dissenting opinion (286-96) is a complete refutation of the position of the majority and constitutes an insuperable intellectual barrier to an affirmance of the judgment below or even an avoidance of a decision by this Court on the constitutional issue. In his view, the majority reading of the statute violates basic canons of construction, reads into it a "hidden" purpose contrary to its plain intent (293), transforms it into a legislative "coup", dispossessing the Patriarch of his traditional canonical jurisdiction over the Cathedral (291), nullifies the canon law of the church, in defiance of *Watson* v. *Jones*, and renders the statute "plainly unconstitutional" (291). He declares that "no other decision reaching such a result can be found in the books" (287), that the appointment of Metropolitan Benjamin as archbishop is an ecclesiastical act which "is final and absolutely binding" on the civil courts (288), that his "possession of the Cathedral is not subject to control by any civil authority or by any judgment of a civil court" (288), and that the motivation of the Patriarch is no constitutional concern of the legislature or the courts (289). And he concludes: "How can there be any dispute but that this Article 5-C, if read so as to take this archbishopric from the central church and give it to appellee's group is unconstitutional" (293).

Let us now turn to the Russian Church, the Constitution and Article 5-C.

The Nature of the Russian Orthodox Church

The Russian Orthodox Church is a constituent member of that group or family of Churches commonly known as the Greek Catholic or Eastern Orthodox Church and whose official name is the "Holy Orthodox Catholic Apostolic Eastern Church".

The original core of the Eastern Church consisted of the ancient Patriarchates of Alexandria, Jerusalem, Antioch and Constantinople, all of whom still exist,[4] and to which have been added, in the process of time, the Russian Church, the various national churches of the Balkan States and other churches in Central Europe,[5] all of whom are in canonical communion with each other.

The Russian Church is Greek because it follows the text of the Bible as originally written in the Greek language.

It is Eastern not only because of its geographic location but by reference to the origin of Christianity in the East.

It is Orthodox because, in its view, it adheres strictly to scripture and the Holy Tradition in their original form;

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[4] The Patriarchs of Constantinople and Antioch have substantial jurisdictions in the State of New York and by Article XV and sec. 15 of Article 2 of the Religious Corporations Law, passed in 1943, these two Patriarchates, together with those of Moscow and Yugoslavia, are designated the "Primary Orthodox Greek Catholic" jurisdictions in that state (Vol. 50, McKinney's Consolidated Laws of New York).

[5] The Uniates, chiefly found in Central Europe, follow the practices of the Eastern Church but accept the Pope as their supreme authority. Periodically, as the political control of the territory in which they lived changed hands, the state compelled them to change their ecclesiastical allegiance. The fate of these Uniates is a standing warning against any attempt by the civil authorities to control the ecclesiastical allegiance of any religious group.

whereas, in its view, the Roman Church has departed therefrom, particularly in the adoption of the *filioque* clause.[6]

It is Apostolic, that is to say, it traces its origin and succession by direct and unbroken descent from Christ and his disciples and claims that this apostolic succession has been in the past and is now being preserved and continued by its governing hierarchy.

It is Catholic, that is to say, universal. It is hierarchal, authoritarian and episcopal, thereby differentiating it, in its form of government, from the Presbyterian and Congregational Churches.

The Government of the Russian Orthodox Church

The supreme authority of the Russian Church is vested in a chief episcopus or Patriarch; he in turn is elected by Sobors or general conventions of the Church (10-11, 163).

From the time of Peter, no Sobors were permitted by the Czars (89). Peter abolished the office of Patriarch and vested supreme authority in a Sacred or Holy Synod, of which his procurator, a lay functionary, was the chief official (88-9). In 1917-18 the first Sobor since Peter's time was held in Moscow and that body restored the authority of the Patriarchate (10-11, 21). There was a brief interregnum during the early years of the Russian Revolution, but by 1927, the Patriarchal Church had been re-

[6] The Orthodox creed is that the Holy Spirit proceeds from the Father alone whereas the Roman Catholic doctrine is that the Holy Spirit proceeds from the Father and the Son. The two Churches also differ in their views as to the status and role of Purgatory and the Virgin Mary in Christian theology and in their liturgy and ritual. The Orthodox Church disputes the Papal claim to primacy, to Petrine succession and to infallibility. For centuries these two great Churches, except for occasional abortive attempts at union, have stood apart.

established (107, 164).[7] The last Sobor was held in 1945 and the present Patriarch was then elected (164, 107-108). The canonical validity of this Sobor and the Patriarch's election is not questioned (31, 244, 246) and he is named in the prayers of the local churches (31). The Appellate Division found that appellee "recognized the 1945 Sobor as authentic and as restoring the Moscow Patriarchate" (276 App. Div. at 318-19). The Patriarch is in full communion with all Eastern Churches (107-108, 37), and in 1948 they celebrated with him the 500th anniversary of the autocephally of the Russian Church. The Anglican Church has recently resumed negotiations with the Russian and other Orthodox Churches to explore a basis for union between them.

The American Archdiocese

The Russian is a missionary church. After founding missions in China and Japan, the Russian Church first established itself on this continent at the end of the 18th century in the Aleutian Islands and Alaska at a time when these territories were part of the Russian Empire. When Alaska was ceded to this country the authority of the Holy Synod over the Diocese of Alaska remained undisturbed. Thereafter the Church established a number of communities in this country and Canada (7, 11-12).

At first the Russian Church here was called a Mission, then a Diocese, then an Archdiocese. Its official name, which bears the stamp of its origin, is "Archdiocese of the Aleutian Islands and of North America" (7, 236). It was a constituent part of the Russian Church at large (21, 164).

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[7] The trials of the Russian Church parallel those of the French Church during the French Revolution (Phillips, *The Church in France, a Study in Revival*, pp. 7-19, 23-41).

The Government of the Archdiocese

At first, the Church on this continent was governed directly by the Holy Synod (12), then through its agent, the archbishop, who was appointed by the Synod (12-13, 15), and answerable exclusively to it.

Under Russian Church law, which remains unaffected by any changes in temporal power, the archbishop of the American Archdiocese is not *elected* by the local churches or clergy; they have no power to do so; he is *appointed* only by the Supreme Authorities of the Church at large (20, 22, 25, 135-6). Thus, the enactments of the Sobor of 1917-18, which had "indisputable canonicity and validity" (254), declare that "Bishops to the foreign missions shall be appointed by the Sacred Synod" (20). The American Diocese was and is a foreign mission (128). In point of fact, all the archbishops who served here were in each instance appointed by the central authorities (16). Indeed, such appointments were, prior to 1917, by ukase of the Czar (89). The Diocese was governed, not by the local churches or clergy, but by the appointed archbishop, and he was answerable not to them, but to the authorities who appointed him (15-16).

Relation Between the American Archdiocese and the Church at Large

The Russian is a Catholic Church. It is not an aggregate or collection of separate or discrete parts, of parishes and dioceses, which are free to federate or separate at pleasure. An Orthodox Church is an indivisible whole. Indeed, it has no parts. It is a unit and, by hypothesis, no diocese or parish may of its own will leave the Church or consider itself a part of the Church and live "autonomously", without breaking the unity, the indivisibility, of the whole. There is and can be only one Russian Orthodox Church.

Canon law does not permit secession or fission in the church under this or that set of circumstances, for this or that reason; there is an absolute bar to such conduct (165). Autonomy cannot be seized, it must be granted. And those who by assertion of their own power undertake to secede or to be "autonomous" or "self-governing", cut themselves off from the Church and all rights to its property (*Watson* v. *Jones*, 13 Wall 679; *Trustees of Presbytery* v. *Westminster Church*, 222 N. Y. 305).

Saint Nicholas Cathedral

The land on which St. Nicholas Cathedral was later built was bought in 1899 in the name of a corporation, organized that same year, of which the Russian Ambassador and the Consul General were the sole trustees (232).

The Cathedral was built about 1903 with money supplied by the Church in Russia and the Russian government, amounting to about $150,000 and they thereafter contributed substantial sums for its maintenance and upkeep (164, 14). Bishop Leonty, appellee's witness, confirmed that "large sums of money were sent by the Russian Church and the Russian government from Russia to acquire the land and build the Cathedral" (14) and that he was "told" that "some money was raised in New York for the Cathedral" (13). Judge Conway says that the Cathedral "was constructed with funds supplied partly from abroad and partly from local contributions" (253), but this hardly does justice to the facts. In 1905, the Cathedral was consecrated as the See of the American Diocese and the official residence, place of worship and headquarters of the appointed archbishop (164-5, 166, 13, 17), and in the words of Bishop Leonty, it "started as a Cathedral of Russia" (8).

The right of the duly accredited archbishop of the American Archdiocese, appointed by the Supreme Church Authorities in Russia, as an attribute of his episcopal office, under the canon law of the Russian Church, to occupy

and use Saint Nicholas Cathedral as his residence, as a place of worship, and as the seat of his government of the Archdiocese, has never been questioned. Even the majority acknowledge as much.[8]

The testimony of the witnesses is unanimous on that point (17, 164-5, 136). All the appointed archbishops have so occupied it (16-17). Occupancy of the Cathedral by any one other than the appointed archbishop would violate the canon law of the Church (17, 165). Appellant Metropolitan Benjamin is the accredited archbishop by virtue of his appointment to that office by the Patriarch (166, 127, 226). The validity of his appointment is not in dispute and Judge Conway refers to him as "the appointee of the Moscow Patriarchate" (274). His status was affirmed by the present Patriarch (227) whose canonicity is acknowledged by appellee. He has been occupying the Cathedral as such archbishop since 1945 (136-7).

As we have seen, the *Kedrovsky* case (214 App. Div. 483, aff'd 242 N. Y. 547), which, in principle, is identical with the one at bar and, apart from the statute, is decisive of the case, held that the canon law of the Church is supreme, that under that law, the Cathedral is held for the exclusive use of the archbishop *appointed* by the Chief Authorities, and, in a suit similar to ours, the Court awarded the Cathedral to such appointee against the claim of the archbishop *elected* by the metropolitan district.

Notwithstanding the above, Judge Conway says that the Cathedral was "dedicated to the use of all the members of the diocese" (253). This is an *ad hoc* assertion which serves his theory (see *infra*, pp. 46-50), but is without any supporting evidence, is wholly arbitrary and is refuted

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[8] "All three duly appointed archbishops, in conformity with the rules of the Russian church used and occupied St. Nicholas Cathedral, as their administrative headquarters and as a place of worship. Those three archbishops were in proper and direct canonical succession and as to that there is no controversy" (255).

by his own acknowledgment that the edifice was consecrated as a Cathedral.

Apart from the *conclusive* evidence on this point, if there are any pertinent facts of which this Court can properly take judicial notice, they are the interlocking status and relationship of the ruling archbishop of a diocese and its cathedral under the canon law, usages and discipline of all hierarchical churches. An hierarchical church is an indivisible spiritual domain, canonically dependent on and governed by the supreme apostolic hierarch, directly and through his canonical subordinates. A diocese is an integral part of that domain, governed by such a canonical subordinate. The cathedral of a diocese is by definition the official residence, administrative headquarters and place of worship of such governing canonical subordinate; and its consecration as a cathedral means its dedication to such use and occupancy.

A diocese is not a parish; a diocesan bishop is not a parish priest; a diocesan cathedral is not a parish church; and an hierarchial church is an authoritarian, not a congregational church. The status and relationship of Metropolitan Benjamin and Saint Nicholas Cathedral under the Patriarch are similar to the status and relationship of Cardinal Spellman (as Archbishop) and St. Patrick's Cathedral under the Pope, for similar reasons of canon law, usage and discipline; and the civil authorities have no more right or power to oust Metropolitan Benjamin from St. Nicholas Cathedral than they would have in case of a schism in that Archdiocese, to oust Cardinal Spellman (as Archbishop) from St. Patrick's Cathedral.

Under canon law it is the Patriarch and not the faithful of the diocese and, certainly, not a majority of them, who determine who shall be the archbishop or who shall occupy the cathedral. It is unnecessary to determine here the nature and extent of any rights the members of the diocese may have in a diocesan cathedral of an hierarchal church

(and we do not here acknowledge that they have any). For whatever those undefined rights may be, they are incidental and subordinate to the rights of the canonical archbishop, and cannot include the right to oust him, because the Russian is not a congregational Church.

The Metropolitan District

In 1924, a group of Russian churches met at a convention in Detroit and declared themselves "temporarily" to be a "self-governed Church • • • governed by an elected Archbishop" and elected Platon (Rojdesvensky) as their Archbishop (187-9).[9]

This "self-governed church" is the "administratively autonomous metropolitan district" which the statute calls the "Russian Church in America" (105).

Our record says that a "number" of churches attended the Detroit convention (24). Bishop Leonty at the Kedrovsky trial said that 160 out of 190 churches attended. A number voted against autonomy (187-8). In 1945 the district claimed 358 churches (215) and in 1948 only 250 churches (159), revealing a substantial split. The Patriarchate claimed that 50 churches adhered to it (130) and the district acknowledges that 13 did so (215).

In 1934, Metropolitan Theophilus was elected head of the district to succeed Platon who had died in the meantime (25, 28). In 1936, the district subjected itself to the supreme authority of a Synod of Bishops, domiciled in

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[9] The autonomy was not declared "pursuant" to the order of November, 1920 (177-9), as the majority assert (284). This order was *not* referred to in the resolutions in Detroit (187-9) and the district did *not* rely on this order in the *Kedrovsky* trial in 1924—a most strange omission if the autonomy had been based on it. Any action taken thereunder had to be confirmed by the Patriarch (179) and the organization of the metropolitan district was condemned (165-6, 189, 224, 141).

Karlovitz, Yugoslavia, calling themselves the "Russian Church Abroad", which purported to act as a rival to the Patriarchal Church outside Russia (32-4, 238, 240). The district pledged "loyalty" to this Synod of Bishops (151-2, 243-4), which first sought the restoration of the Czar (Spinka, *The Church and The Russian Revolution*, p. 166), then joined its fortunes to those of Hitler (144, 145-6) and, with the liberation of Yugoslavia, followed him back to Germany (143-4, 32). The district continued under the authority of this Synod while Hitler was in control of Yugoslavia, but when the "Russian Church Abroad" had ceased to exist altogether (147, 243-4), it withdrew from that organization and, at its convention in 1946, "resolved that His Beatitude Alexy, Patriarch of Moscow and all Russia, be requested to continue us in his fold and be our Spiritual Head" on terms of autonomy (222).

The life history of the metropolitan district is this: In 1924 it withdrew from the Russian Church at large; in 1936 it subjected itself to the authority of the Karlovitz Synod; and in 1946 it seceded from that organization and sought to rejoin the Patriarchate. Although Judge Conway finds the recent history of the Russian Church "vital to our (his) inquiry" (253), he wholly ignores this Karlovitz episode which took up more than one-third of the life of the metropolitan district.

The Patriarch at all times took the position that the organization of the metropoltan district and the actions of Platon and Theophilus violated "the canons, rules and usages of the Russian Orthodox Church and are null and void" (165, 224-5, 147-8, 149) and placed Platon and Theophilus under suspension (165-6, 225). Like rulings were made outlawing the Karlovitz Synod from the very beginning (141-3, 109-10).

Negotiations Between the Patriarch and Metropolitan Theophilus

Subsequent to the Sobor of 1945, where the present Patriarch was elected, negotiations for reunion between the Patriarch and the metropolitan district proceeded up to the date of trial in 1948 (131-3, 219-21). Representatives of the district had arrived one day too late to attend this Sobor (126), but, since the district was then under patriarchal suspension and was subject to the jurisdiction of the Karlovitz Synod, it had no canonical right of representation. However, they received from the Patriarch the proposal of February, 1945, as a basis for negotiations for reunion (127, 227-8).

It proposed that all the Russian churches on this continent convene at a new Sobor, that these churches organize themselves into a patriarchal exarchate which should have extended powers, including the right to elect its own archbishop, subject however to the right of the Patriarch to refuse confirmation "for any motivated reason whatsoever" (227-8).

In a highly self-serving manifesto (209-19), the *leaders* of the district rejected this proposal on the alleged ground that there was "implicit" in it (216) a pledge of loyalty by the local clergy to the Soviet government (216-9).[10] The claim was unfounded and Professor Feodotov, appellee's expert, acknowledged that the offer made no such demand (157-8). To be sure, the proposal requested that the local church declare its "abstention" from political activities against the U.S.S.R. but this did not differ greatly from the policy which the metropolitan district itself had previously adopted when it declared (216):

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[10] In this respect the manifesto followed the familiar propaganda technique of ascribing to an opponent unacceptable claims *not* made by him, as a prelude to a rejection of his proposal.

> "The Council of Bishops finds it necessary to recommend to the clergy of the Metropolitanate, for the general welfare, not to touch upon political questions and not to make any public speeches on the subject, especially from the pulpit".

Metropolitan Benjamin testified that the policy of the Patriarchate was that of "refraining from politics only * * * both in the Church and in the name of the Church" (114, 122) and "that the answer of the Russian Church is absolutely clear. It cannot prevent any citizen from fulfilling his obligation and does not demand it" (124).

The *membership* of the district saw in the Patriarch's proposal no demand for such a pledge of loyalty, for in their 1946 convention they requested the Patriarch to "continue us in his fold" on terms of autonomy (222).

And neither, for that matter, did the *leaders* of the district, notwithstanding their manifesto, for in a telegram to the Patriarch, Metropolitan Theophilus said that it was his "pleasant duty to communicate * * * to your Holiness" this request for reunion (220).

In his reply, the Patriarch welcomed this decision and said that "on principle" he had no objections to autonomy and he indicated that he was sending Metropolitan Gregory to decide all questions with Metropolitan Theophilus (220).

Metropolitan Theophilus acknowledged that this message "has brought us great joy", that "We await from your Holiness an official ukaz recognizing autonomy for our Church", and expressed the hope that "everything will be decided peacefully for the good of the unity of the Church" (221).

Metropolitan Gregory did come here but the negotiations did not bring about an agreement and he gave his evidence at the trial without being cross examined (163-7). We invite an earnest examination of his testimony for, in our opinion, it constitutes a complete refutation of Judge Conway's position.

From the foregoing, the following conclusions emerge clear and indisputable:

1. The negotiations for reunion foundered, not on the spurious claim that there was a demand for a pledge of loyalty to the Soviet government, nor on the equally spurious claim that the Patriarchate was not a "true" religious body but a "tool" of that government, but, as the Appellate Division, the ultimate authority on the facts, found (276 App. Div. at 319-20), on the purely ecclesiastical issue as to the extent of the patriarchal power to confirm locally elected bishops. Even in its demands for full autonomy, the metropolitan district acknowledged that to the Patriarch was to be reserved "the right of appeal of Bishops, the bestowal of the Holy Myrrh, the awarding of higher titles to the clergy, communications with the other Orthodox Patriarchates" (216-7), but, whereas the Patriarch sought the right to refuse confirmation of locally elected bishops "for any motivated reason whatsoever" (228), the metropolitan district sought to limit this right of veto "only on strictly canonical or moral grounds and after full and impartial hearing" (218).[11]

2. The negotiations for reunion constitute a complete refutation of the claim that the Patriarchate was not a true religious body but an agency of the Soviet government.

3. Neither at the trial nor in the Appellate Division, did appellee itself, as that court found, claim that the Patriarchate was not a "true" Church. The record shows (148-9):

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[11] The canon law provides that where a bishop may be elected locally, "his election shall be submitted to the confirmation of the Supreme Church Authority" (20, 136, 26-7). Such confirmation is indispensable to apostolic succession. Canonically, a priest cannot be "elected" a bishop; he is merely "elected" a candidate for confirmation and consecration by Higher Authority, and such an "election" is not binding on the Patriarch. The metropolitan district itself acknowledged as much.

"The Court: It seems to me that nine-tenths of the evidence adduced so far on both sides is completely foreign to the issues in this case. I can't understand. After all, there is no jury in this case and you gentlemen seem to be proceeding on the theory that the political tincture of the respective factions has something to do with their right to occupy this Cathedral. I am sure that you are not soberly advancing the idea that because one faction may be Communist or anti-Communist, or one faction may be Fascist or anti-Fascist, it has anything to do with the right to occupy the Cathedral.

Mr. Arkush: I certainly haven't advanced any such idea.

The Court: I dare say 75% of the evidence has been directed towards that proposition.

Mr. Arkush: Our endeavor was to show that the Patriarchal Church was cut off from communication with America and therefore we came under the jurisdiction of the ukase to declare our autonomy.

The Court: That was twenty years ago."

4. The theory that the Patriarchate was not a "true" Church but a "tool" of the Soviet government and the theory that it should be presumed that Article 5-C so declared, was invented and first introduced into the case by Judge Van Voorhis, dissenting in the Appellate Division, and was later taken over bodily by Judge Conway and his associates.

Specification of Errors

The New York Court of Appeals erred in reversing the judgment in favor of appellants and awarding judgment in favor of appellee.

Appellants tender the following issues which have been included in the assignment of errors.

The Constitutional Issues Presented

1. Is the ouster, by force of Article 5-C, of appellant Benjamin, the appointed archbishop, from St. Nicholas Cathedral, a violation of protected religious liberty?

2. Is such ouster, by force of the statute, a deprivation of property without due process?

3. Is the ruling that the Trial Court has the power to exercise its "discretion" to determine if the appointed archbishop is a "proper trustee" or a "proper person" to occupy St. Nicholas Cathedral, a violation of protected religious liberty?

4. Does the judgment below in other respects violate due process of law?

Summary of the Argument

The Russian Orthodox Church is Apostolic, Catholic, Episcopal and Hierarchal; and its supreme authority is a Patriarch.

The American Archdiocese is an integral part of the Russian Church and is subject to the ecclesiastical jurisdiction and government of the Patriarch and the archbishop appointed by him.

The Archbishop of the American diocese is appointed by the Patriarch; and even in those cases where a bishop may be elected, his election must be confirmed and his consecration ordered by the Patriarch, in order to secure apostolic succession.

St. Nicholas Cathedral was built and maintained by the mother church and by its authority was consecrated a Cathedral of that church and, under canon law, this Cathedral is reserved for the exclusive use of the archbishop appointed by the Patriarch, and its occupancy by any other person would be a breach of canon law.

The holder of the "legal title" to the premises, whether a natural person or a corporation, has no right whatever to determine who shall occupy the Cathedral. That is decided exclusively by canon law.

Metropolitan Benjamin is the archbishop of the American diocese by appointment of the Patriarch and, under canon law, has the exclusive right to occupy St. Nicholas Cathedral, to sit in the bishop's seat and conduct religious services there. Such appointment is an official act and a decision on a denominational matter of internal church government by the supreme church authority and as such is final and absolutely binding on the civil courts. His right to the exclusive possession of the Cathedral may not be limited by any judgment of any civil court and no civil court may decree possession of that Cathedral to any other person against the authority of the Patriarch (*Watson* v. *Jones*).

Under the First Amendment, made applicable to the states by the Fourteenth, the state is forbidden to pass any law "respecting an establishment of religion or prohibiting the free exercise thereof". That means that the state has no power to interfere in or regulate the internal affairs of a church, to prescribe its ecclesiastical allegiance, to nullify its canon law or bar its ministers from exercising their religious functions, in accordance with that law.

Article 5-C, as construed below, by directing that the appointed archbishop be ejected from the Cathedral and that possession thereof be awarded to a locally elected but unconfirmed archbishop, nullifies the canon law of the Russian Church, alters the government of that Church, interferes with the free exercise of religion by the appointed archbishop and establishes the metropolitan district as the *orthodox* Russian Orthodox Church in New York, in contravention of the First Amendment.

Religious liberty may be restrained, if at all, only by the clear and present danger test. Restraints on occupancy

of the Cathedral by the appointed archbishop cannot possibly meet this test and accordingly violate the First Amendment.

The alleged pledge of "loyalty" by the Patriarch to the Soviet government was required by Christian tradition. The postulate that, because of this pledge, the Patriarchate is not a "true" Church but a "tool" of the Soviet government, is wholly baseless and arbitrary; is contradicted by the record and cannot rest on "judicial notice". This postulate is not found in the statute, cannot be read into it by "presumption" and, in any event, cannot furnish constitutional justification for a restraint on the free exercise of religion.

The judgment was not based on common law and, if it had been, a new trial would have been ordered; but a new trial was not ordered, and final judgment was directed against appellants, *solely* by the "mandate" of the statute.

But even if the judgment were based on common law grounds, it would be equally repugnant to the First Amendment, which binds all agencies of government, including the Courts.

The state cannot, under the guise of supervising the conduct of trustees or regulating the use of real property, curtail religious liberty.

The judgment below does not and cannot possibly rest on independent and adequate grounds of state law beyond the jurisdiction of this court to review and correct.

Apart from its invalidity on the ground that it curtails religious liberty, the judgment below, because of the basic errors on which it is founded, violates due process of law.

POINT I

The statute, as construed and applied by the Court of Appeals, constitutes an abridgment of freedom of religion guaranteed by the First Amendment to the United States Constitution, made applicable to the State by the Fourteenth.

A. The First Amendment withdraws from the civil power the entire field of religion and the internal government of all religious societies.

The command of the First Amendment, which now binds the states as well, is that Congress

> "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;"

Here was a new and revolutionary principle of government and its full scope can best be appreciated by considering the theories governing the relation of Church and State which had heretofore existed and which in effect were rejected by the First Amendment.

The Western Medieval Theory—Theocracy

To the medieval mind, society was a unity the government of which was divided between the Church and the Prince. The accepted view was that there was one true faith and one true Church which it was the duty of the secular power to safeguard. In turn, the Church taught obedience to the state. The Church defined heresy and the state punished the heretic, not merely to preserve the faith and the Church, but also for the eternal good of the heretic—by enforced salvation. The right of the individual to choose his own faith or his own Church, or the right of a competing Church to exist at all, was wholly inadmissible (Brown: *Church and State in Contemporary America*, pp. 58-9, 184-193).

The relation of Church and State in the Middle Ages was further complicated by the claim of the Pope to supremacy in temporal affairs as well. After the fall of Rome, the Western Church, as the only remaining unified body, filled in the power vacuum of the time and became, as it were, the residuary legatee of the Roman Empire. Under the guidance of strong personalities, the Popes claimed supremacy over princes in temporal matters as well and the struggle between Pope and Prince constituted one of the principle themes of the story of the Middle Ages.

The Protestant Theory—Erastianism

Under Protestantism the Royal Prerogative replaced papal supremacy. In England, King Henry VIII became the "Pope, the whole Pope and something more than the Pope". The Church became wholly riveted to the state and whatever rights it had came directly and solely from the state (*Rommen, The State in Catholic Thought,* pp. 544, 374, 420). Thus the Tudor State not only established the Anglican Church but determined its internal government, appointed its bishops, convened its religious assemblies, fixed its creed, compelled attedance at its Church, enacted compulsory tithes, outlawed the jurisdiction of the Pope ("The Bishop of Rome hath no jurisdiction in this realm of England", said an Elizabethan statute), prohibited all non-conformity, and made any ecclesiastical deviation a civil offense (Butt, *The American Tradition in Religion and Education,* pp. 14-15; Green, *Religion and the State,* pp. 1-23).

The paradox was that Protestantism was based on the right of private judgment in religion, but so strong was the tide of nascent nationalism, so overpowering the fear of Catholicism, that religious uniformity was deemed necessary to political unity; and, accordingly, the individual right of conscience was sacrificed. Religion was not a

private but a *community* concern and the subject had to adopt the religion of the sovereign: *Cujus regio, ejus religio* (Butt, *supra*, 14-15).

Orthodox Caesaro—Papism

The decay of the secular power of Rome increased the power of the Byzantine Emperor as head of the Roman Empire of the East. Here too, Church and State were united in a partnership to preserve the one true Orthodox faith and the one true Orthodox Church of the East. But here the Emperor remained the senior and dominant partner and the Church was subordinated to his authority. One of the Patriarchs put the matter thus: "It is not possible for a Christian to have the Church and not the emperor * * * and it is not possible to separate the one from the other" (Baron, *Modern Nationalism and Religion*, p. 167). The resulting relationship between them has been aptly described as "Orthodox Caesaro-Papism" (Baron, *supra*, Ch. VII, pp. 155-212).

The status of the Russian Church under the Czars was the most perfect expression of Caesaro-Papism. The Czar abolished the office of the Patriarch and became the secular head of the Church; he controlled the Holy Synod through his civil procurator; he appointed the bishops, including the archbishop of the American Archdiocese. The Church was financially supported by the state and the clergy became its paid officials. The Church was more than "loyal" to the Czar, it was part and parcel, one of the mainstays, of his regime. The Church demanded that "all ecclesiastical agencies bolster the old combination of autocracy, orthodoxy and nationality" (Baron, *supra*, p. 179). So intimate was the nexus between the Czar, the Church and Russian nationalism, that in the eyes of some students that Church for a time appeared to be nearer earth than heaven (Spinka, *The Church and The Russian Revolution*, pp. 1-10).

Church and State in the Colonies

The early colonists brought with them the religious practices of the mother country; they merely planted in new soil a branch of the old world tree. Thus, in Virginia the Anglican Church was established; in Massachusetts the Puritans founded their Bible society along Calvinistic theocratic lines. The other colonies varied in their religious practises between these two extremes, except Rhode Island, which was founded as "a shelter for persons distressed for conscience" (Green, *supra*, 23-47; Butt, *supra*, pp. 15-20).

The Separation Principle

The First Amendment repudiated and rejected the theories and practices of the State—Church relationship of the old world. It introduced a new and far reaching principle of complete religious liberty for the individual and complete separation of Church and State—of a free Church in a free State. Religion and its exercise was a matter of *personal*, not *state* concern. Churches, their internal government, their discipline, and their ecclesiastical affiliations, were subject only to canon law and were completely removed from the jurisdiction of the civil power. A Church was an autonomous society which the civil government could not control and in whose internal affairs it could not meddle. Church and religion were a sanctuary which the state could not enter. "Religion is wholly exempt from the authority of the Society at large" said Madison, one of the great architects of the First Amendment.

This complete separation of Church and State, this complete immunity from interference by the civil power in the internal discipline of churches and the exercise of their religion, is the cornerstone of our liberties. James Bryce has reminded us that half the wars of Europe, half the internal troubles that have vexed European States for

fifteen hundred years have arisen from the rival claims of Church and State and the attempts of one to control the other, but that this "whole vast chapter of debate and strife has remained virtually unopened in the United States"—thanks to the First Amendment (Bryce, *The American Commonwealth*, Vol. 2, p. 695). That Amendment has served the country well and a heavy responsibility rests on him, be he Judge or Legislator, who seeks to make the slightest breach in Jefferson's "wall of separation" between them.

Dissenting in *Everson* v. *Board of Education* (330 U. S. 1), Mr. Justice Jackson said that the guarantee of religious liberty "was first in the Bill of Rights because it was first in the fore-fathers' minds; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the state's hands out of religion, but to keep religion's hands off the state * * *" (at p. 26).

In the great case of *Watson* v. *Jones* (13 Wall. 679), this Court laid down the fundamental principle, universally accepted in this country, that the canon law of an hierarchal Church, as pronounced by its chief authorities, is supreme in all matters affecting members of the faith and that the civil courts will accept the canon law as "final" and "binding" upon them (at p. 727), a rule that necessarily stems from the separation principle embodied in the Constitution. Dissenting here, Judge Desmond says that "*Watson* v. *Jones* (*supra*) does not use the precise word 'unconstitutional' but the opinion, contrasting American with old world systems (see p. 728 *et seq.* of 13 Wall (U. S.)), says that 'in this country the full and free right to entertain any religious belief, to practice any religious principle' finds expression in the American rule of law that the determinations of the tribunals and judicatories of a centrally—organized church are absolutely binding on the civil power." (293-4).

Pursuant to that principle, this Court in *Watson* v. *Jones* ruled that an incorporated parish church in Ken-

tucky remained subject to the jurisdiction of the central Presbyterian Church, against the claim of the southern branch of that church, which had seceded because of its dispute with the central church concerning slavery. The local state court had awarded the church to the seceders and its marshal was in actual possession thereof. This Court criticized the action of the state court as an interference in the internal affairs of the Church (at 732) and protected, by injunction, the exclusive right of the pastor, accredited by the central Church, to officiate and exercise there his ecclesiastical functions. *Watson* v. *Jones* is part of the Constitution.

Stemming from the holding in this case is the reminder of Mr. Justice Jackson in *Prince* v. *Massachusetts* (321 U. S. 158) that "Religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be" (at 177).

Occupancy of St. Nicholas Cathedral by the archbishop appointed by the Patriarch is required by canon law and is an activity which concerns only members of the faith and ought to be free—as nearly absolutely free as anything can be. It is part of the sacramental system of the Church which is totally immune from regulation by the state.

If under the First Amendment the state has no power to compel a child to attend a public instead of a parochial school (*Meyers* v. *Nebraska,* 262 U. S. 390) or even to salute our flag in our public schools in the interest of patriotism but against his religious conviction (*West Virginia School Board of Education* v. *Barnette,* 319 U. S. 624), then surely it has no power to eject the canonical archbishop from a Cathedral reserved for him by canon law.

B. The Statute, by directing the transfer of Saint Nicholas Cathedral from the jurisdiction of the Patriarch to that of a locally elected archbishop and by requiring the ouster of the Patriarchal Archbishop from the Cathedral, which is reserved for his exclusive use by canon law, interferes in the internal affairs of the Russian Church, prohibits the free exercise of religion by that Church and violates the constitutional guarantee of religious liberty.

When we speak of the "statute" we refer, of course, to the statute as read by the majority below. That reading, Judge Desmond has pointed out, violates basic canons of construction, arbitrarily distorts it, contrary to its plain intent, and ascribes to it a "hidden" meaning. To be sure, the basic issue in this Court is not whether the majority below properly interpreted the statute, but, whether however arbitrarily construed, it meets the constitutional test. Nevertheless, the arbitrary *ad hoc* misreading of the statute in our case bears on its reasonableness and thus on its constitutional validity (cf. *Terre Haute, etc., Railroad Co.* v. *Indiana*, 194 U. S. 579).

As read below, the statute outlaws the patriarchal jurisdiction in New York state and commands that "every" Russian church in that state 'shall recognize and be and remain subject to the jurisdiction and authority of the * * * archbishop" elected by the metropolitan district. The sweep of this statute literally takes one's breath away. "The Patriarch of Moscow hath no jurisdiction in this Empire State of New York" is kin to the Elizabethan command that "The Bishop of Rome hath no jurisdiction in this realm of England." That is a command appropriate to a Tudor King, not to a modern legislature subject to the First Amendment.

Many believe, and with reason, that the metropolitan district lacks apostolic succession and has no canonical standing; indeed, the Patriarch has so ruled. The status

of Metropolitan Theophilus as a bishop is in doubt for his consecration was not authorized or confirmed by higher authority as required by canon law (26, 28, 165-6), and he is now under canonical suspension. That the metropolitan district itself felt and still feels an inner insecurity on that score, is shown by the memorandum, self-serving though it is, prepared by Professor Feodotov and his associates (242-7). That is why, in the hope of joining the Universal Church and acquiring apostolic succession, the metropolitan district had subjected itself to the Karlovitz Synod, on the theory that that body was a canonical hierarchy; but even that gossamer link (if it ever existed) with Universal Orthodoxy is now broken, and the metropolitan district is again in a canonical void. In these circumstances, for the civil power to direct all Russian Orthodox churches to "recognize" and subject themselves to the "jurisdiction" of a bishop and a district whose canonicity, whose apostolic succession, they may hold in doubt, is a grave intrusion into that field of conscience which is protected by the Constitution and the elementary decencies as well.

The majority below seek to blunt the rough impact of this statute on religious liberty by the euphemism that the statute does no more than "trace and identify, *as of to-day*," the metropolitan district as the "authentic group entitled to the administration" of the properties of the Russian Church (280-1, italics added).[12] The implication is that, as of tomorrow, the legislature may "identify" some other group as "authentic", and so on, thereby placing every religious society at the complete mercy of the state. May the state decide which religious group is "authentic"? Not under the First and Fourteenth Amendments.

Furthermore, the validity of a statute "must be tested by its operation and effect" (*Near* v. *Minnesota*, 283 U. S. 697, 708) and not by the gilded gloss put upon it. In *Marsh*

[12] We are not concerned with the right "to administer the properties" of the Russian Church, but *solely* with right of the appointed archbishop to occupy the Cathedral as required by canon law.

v. *Alabama*, 226 U. S. 501, a statute forbidding trespassing on private property—a matter of purely local concern—was held invalid when it was applied to bar the distribution of religious literature on such property in disregard of no trespass signs. A state may not regulate the use of real property in such a manner as to curtail the free exercise of religion (cf. *Shelley* v. *Kraemer*, 334 U. S. 1, 22). Concurring in the *Marsh* case, Mr. Justice Frankfurter said: "But when decisions by State courts involving local matters are so interwoven with the decision of the question of Constitutional rights, that one necessarily involves the other, State determination of local questions cannot control the Federal Constitutional right" (at 510).

The statute launches the most violent assault on religious liberty that has ever been attempted in this country since the adoption of the Constitution. It is absolutely unprecedented. For its like we must go back to the Middle Ages or the Tudor Kings. "No other decision reaching such a result can be found in the books" (287), rightly says Judge Desmond, dissenting here.

The conflict between this statute and the First Amendment is, we submit, clear beyond argument. The only remaining question is whether there is any justification for this breach of the constitutional guarantee.

C. There is no constitutional justification for the statute.

1. The statute cannot survive the clear and present danger test.

It is difficult to perceive how an exercise of religion can have that element of advocacy of more or less immediate illegal conduct which is given as the sole justification for restraints on speech under the clear and present danger test. In any event, possession of the Cathedral by the appointed archbishop affects only members of the faith and is not an exhortation to any action, let alone illegal

action; and the prohibition by statute of such possession cannot possibly be justified by any form of the clear and present danger rule heretofore employed.

2. The proffered justification for the statute, viz., that the Patriarchate is not a "true" Church, is inadmissible.

The majority below make no attempt to sustain the statute by the clear and present danger test. They tender as *sole* justification for the constitutionality of the statute the following theory: The Patriarch pledged "loyalty" to the Soviet government and demanded a like pledge from the clergy abroad (264-273). Therefore the Patriarchate is not a "true" religious body but a "tool" of that government (272, 284). This conclusion is "determinative" (272). We are to "presume" that the statute made a "determination" to this effect (281, 3, 4) and this "presumed determination" constitutionally justifies the suppression of the Patriarchate and the ouster from the Cathedral of the archbishop appointed by it.

Each of the postulates of this theory is wholly arbitrary and without a vestige of justification. Let us examine them.

3. There was no demand for a "pledge of loyalty" by the clergy *abroad* to the Soviet State.

Upon what ground do the majority assert that the Patriarchate is not a "true" Church? They point (a) to the imprisonment of the Patriarch—in 1923, (b) the emergence of the Living Church—which disappeared in 1925 (164, 42), and (c) the alleged "pledge of loyalty" to the Soviet state by the Patriarchate when it was restored in 1927 and its alleged demand for a similar pledge from the clergy *abroad* (273, 264). The first two claims border on the fantastic. Only the last claim need be considered.

There is no proof whatever to support the assertion of the majority that the Patriarch attempted to "exact" or promised to "secure" from the clergy *abroad* a pledge of loyalty to the Soviet state, let alone such a "written" pledge, as Judge Conway asserts (264). This is an arbitrary assertion without any factual support whatever in the record.

4. The alleged "pledge of loyalty" by Patriarch Sergius to the Soviet State in 1927 does not show that the Patriarchate is not a "true" Church.

Patriarch Sergius, we submit, was addressing the Russian clergy in 1927 when he spoke of "our sincere readiness to be fully law abiding citizens of the Soviet Union, loyal to its government, and definitely to hold ourselves aloof from all political parties or enterprises seeking to harm the Union" (207). At the same time he emphasized that "we cannot be silent about the contradiction which exists between us Orthodox and the Communist Bolsheviks who govern our Union" (207).

A student of church history will recognize this as a statement of the classic position of the Christian Church with respect to *any* political or economic system (Dunning, *History of Political Theories*, pp. 152-3). It is in full harmony with the recent pronouncement of Pope Pius, wherein he said that the Church "does not meddle in problems purely political or economic, nor does she deign to pass judgment upon the usefulness or the harm of one form of government or another" (New York Times, Feb. 21, 194[illegible], p. 3). The Patriarch had, at first, anathematized the revolution (201), but when the Soviets became the *de facto* government he could not reverse the verdict of history. All churches, [illegible] they must be "loyal" to the Caesar of the day, that is, the clergy must be law abiding citizens and not political revolutionaries; the Orthodox Christian will be "always and everywhere" an exemplary citizen of "any"

state "including that of the Soviets" (207)—or that of the Czars or that of the Mongol Khans. Christians are also citizens and must obey their rulers—even non-Christian rulers. "Obedience to the state was demanded (by the Church) as a religious obligation as well as a political necessity" (Gettell, *History of Political Thought*, p. 87; Rommen, *The State in Catholic Thought*, pp. 12, 583). We respectfully submit that the position of the Patriarchate is in full conformity with, indeed, is required by Christian tradition [18] and its condemnation on that score is, to say the least, uninformed.

Strong support for the Patriarch's position is found in a recent sermon on "God and Country" delivered in St. Patrick's Cathedral by Bishop Sheen, which is reported as follows in the New York Times, March 17, 1952, p. 15:

> "If I began preaching a revolution against the government of the United States, I would be suspended and silenced. Not because what I said was inopportune but because it is opposed to the spirit of America and the spirit of the Church * * *.
>
> The Roman Catholic Church has taught that the authority of civil government comes from God and therefore must be obeyed and * * * the Church would not countenance a revolt even against an atheistic, pagan or totalitarian government. If a persecution against us ever began in the United States, we would still be obliged to respect the government and not to revolt against it."

The Catholic Church in Italy, when Mussolini was in power, made a much stronger pledge of loyalty to the

[18] According to Metropolitan Benjamin, the policy of the Russian Church was that of "refraining from politics only * * * both in the Church and in the name of the Church" (114, 122), that "you may criticize the Soviet government, but only as private men" (123), and that this was "an expression of the Christian attitude to the government" (123). Appellee's counsel repeatedly called this a demand for a pledge of loyalty to the Soviet government, but appellants protested against such abuse of terms (121-3).

State. Article 20 of the Lateran Concordat between the Pope and Mussolini, as head of the State, executed in 1929, provides:

> "All bishops, before taking possession of their diocese, will take an oath of fealty to the Head of the State, according to the following formula: Before God and His Holy Gospel I swear and promise, as is fitting in a Bishop, fealty to the Italian State. I swear and promise to respect, and to make respected by my clergy, the King and the Government established according to the constitutional laws of the State. Further I swear and promise not to take part in any agreement, nor to be present at any meeting, which may injure the Italian State and public order, and that I will not permit my clergy to do so. Desirous of promoting the welfare and the interests of the Italian State I will seek to avoid any course that may injure it" (*Italy To-day*, 1929, N. Y. Public Library).

This is not offered by way of criticism. It would be presumption to do so, even by those outside the Church. The judgment of the Pope, as the guardian of the interests of his Church, is conclusive on all; and the Papacy was not, by this exercise of judgment, transformed from a "true" religious body into an agency of the Fascist state.

In brief, if by pledging loyalty to Caesar, a Church becomes Caesar's "tool", there is no "true" Church anywhere, for every Church of necessity pledges loyalty to him.

5. The "Contradiction" Between the Russian Church and the Soviet State.

But Patriarch Sergius did not merely pledge "loyalty" to the Soviet government. In the very same breath he asserted the independence of the Church. He said (207):

> "But let us be sincere to that end. We cannot be silent about the contradiction which exists between

> us Orthodox and the Communist Bolsheviks, who govern our Union. They set as their purpose struggle with God and His power in the hearts of the people. We on our part see the whole sense and whole aim of our existence in confession of faith in God and strengthening of the faith in the hearts of the people. They recognize only the materialistic interpretation of history, and we believe in the providence of God".

Further illumination on the relation between the Russian Church and the Soviet State is furnished by a statement of the Russian bishops, published about the time of Patriarch Sergius' pronouncement, which is reprinted in Anderson, *People, Church and State in Modern Russia*, pp. 89-94. A portion thereof, which we deem relevant here, is annexed hereto as Appendix B. It is a memorable document. The Russian bishops, having gone through fire, returned to first principles; their manifesto is a cry *de profundis*. They embrace the principle of complete separation of Church and State; and while they acknowledge the necessity of being "loyal" to the Caesar of the day—as all churches have been always and everywhere—they emphasize the basic "irreconcilability of the religious teaching of the Church with the materialism and the official philosophy of the Communistic Party and the government of the Soviet Republics directed by that party", and assert that, because of the "deep difference in fundamental principles separating the Church and State it becomes impossible that an inner nearness or reconciliation could exist between them" (pp. 67, 68, *infra*).

6. There is no evidence whatever in the record that the Patriarchate is not a "true" Church.

Appellee never raised this issue at the trial and none of its witnesses gave any testimony on that score. On the contrary, Professor Feodotov's memorandum acknowl-

edged the canonical continuity and the restoration of the full authority of the Patriarchate and urged reunion with that church (242-6, 106-7, 31). He accepted as correct the assertion of the Patriarch that "Our Russian Church has not been led astray. * * * It has kept unsullied its canonical consciousness and at the same time its correct and canonical supreme direction—that is, its part in the life of the Ecumenical Church and its right place in the harmony of the Orthodox Autocephalous Churches" (102-3, 104). In 1946, the metropolitan district itself resolved that "His Beatitude Alexy, Patriarch of Moscow and all Russia be requested to continue us in his fold and be our spiritual head" on terms of autonomy (222), and Metropolitan Gregory testified, without being cross-examined (167), that the Patriarchal Church "is functioning freely as an Orthodox Church, without interference by the civil authorities" (167). Appellee offered not a word of evidence to the contrary. To be sure, since the present status of the Patriarchate was not an issue at the trial, appellants' testimony on the subject is not as complete as it otherwise would have been. But it is the *only* testimony in the record on the point and there is literally nothing to contradict it. Indeed, the negotiations between the Patriarch and the metropolitan district for reunion, as the triers of the facts found, falsify any claim that the Patriarchate is not a "true" Church.

7. The Illegitimate Use of Judicial Notice.

In the face of the above testimony and the findings of the trial courts, the majority below base their conclusion that the Patriarchate is not a "true" Church on "judicial notice" of alleged historical facts (272-3). But a judge may not by judicial notice reach a conclusion contradicted by the record.

The Court of Appeals had no jurisdiction here to make new findings of fact[14] (New York Civil Practice Act, sec. 605) and we are not to assume that it exceeded its jurisdictional competence. In criticism of the postulate that the Patriarchate is not a "true" Church, the dissent below said that it "*amounts* to a new finding by this court, without evidentiary support in this record, and in the face of contrary testimony, and express contrary findings by both courts below" and that it is an "*attempted* determination of a fact, vigorously denied by witnesses, and found to the contrary by the courts which have jurisdiction to pass on facts" (288, 289, italics added). In these circumstances, a decision against appellants based on "judicial notice" of alleged facts contrary to the record is, we submit, a decision by prejudice in defiance of evidence.

8. The Illegitimate Use of Presumption.

Not having the facts to support them, the majority resort to presumption. In their view, the legislature "concluded" that the Patriarchate is not a "true religious body" but a "tool" of the Soviet government (284), that this "must be deemed to have been found" by the legislature (283, 281) and that Article 5-C made a "determination" to this effect (281).

But we search the statute in vain for the slightest evidence of such a "determination". It simply isn't there. The majority below find in the statute what they themselves put there in the first place. They see what they want to see.

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[14] According to Judge Conway (262) the Court of Appeals affirmed the *Kedrovsky* decision on this ground, viz., that since there was sufficient evidence to sustain the findings of the Appellate Division, the Court of Appeals was bound to affirm. But, in addition, the Court there, like *Watson* v. *Jones*, sustained the supremacy of the canon law and affirmed the judgment which enjoined interference by Platon with occupancy of the Cathedral by the appointed archbishop.

But such a "presumption" has not the slightest basis in fact and is wholly arbitrary.[15] The statute contains no declaration of policy or findings of fact; there were no hearings or committee reports on it. It was passed in 1945, just two years after the legislature had designated the Patriarchate as one of the four "primary" Orthodox jurisdictions in the state and Governor Dewey had proclaimed Metropolitan Benjamin as the living successor to the early Russian bishops who had founded the American Diocese; when the metropolitan district was still subject to the Karlovitz Synod, whereas the Patriarch had rallied the Russian people against Hitler; and when the Soviet government was still our military ally.

Against this background, even an *express* legislative determination that the Patriarchate was not a "true" Church would have been arbitrary in the extreme, let alone a "presumption" to that effect, which in these circumstances can be nothing more than an expression of a prejudice.

If such use of "presumption" is permitted no statute is safe, for a judge would then be free to read into a statute anything he desires; and we would be governed not be statutes but by the prejudices of judges.

Presumptions may have a legitimate role in dealing with statutes affecting commercial activities (*United States* v. *Carolene Products Co.*, 304 U. S. 144), but they will not suffice in legislation restricting the freedoms of the First Amendment, particularly religious freedom (*West Virginia School Board of Education* v. *Barnette*, 319 U. S. 624, 639; *Thomas* v. *Collins*, 323 U. S. 516, 530). The command of the First Amendment that there shall

[15] Equally arbitrary is the somewhat different presumption appellee invoked on the previous argument here, viz., that the statute made a "determination" that there was a "likelihood" that the Patriarchate would be used for Soviet propaganda in this country. This emphasizes the danger of resort to this dubious device: each one fashions his own presumption *ad hoc*.

be "no law * * * prohibiting the free exercise" of religion is, as Mr. Justice Jackson said, "set forth in absolute terms". Of necessity this freedom is "presumed to be invulnerable" and any attempt to curtail it by statute "is *prima facie* invalid". (Mr. Justice Murphy, dissenting in *Prince v. Massachusetts*, 321 U. S. 158, 173). In other words, the presumption is *against* the validity of such a statute and the burden of proving the necessary supporting facts is cast upon him who seeks to sustain it (*Busey* v. *District of Columbia*, 138 Fed (2) 592, 595). And that burden can be met only by satisfying the clear and present danger test.

9. Reductio ad Absurdum

As we have seen, the foundation of the position of the majority below is the alleged statutory "determination" that the Patriarchate is not a "true" Church. At the same time Judge Conway reads into the statute the limitation—as arbitrary as his initial construction thereof—that it presses into the compulsory jurisdictional embrace of the metropolitan district *only* those patriarchal churches which were established *prior* to 1924—leaving those established *after* 1924 free to adhere to this "tool" of the Soviets (272, 6, 9). The view of Judge Van Voorhis, who invented this theory, was that the statute suppressed the Patriarchal Church in its entirety. However erroneous that position is, it is, at any rate, consistent. If the Patriarch is an agency of the Soviet government, his theory calls for the extirpation of the Patriarchal Church root and branch. But Judge Conway, who adopted this theory, reads into the statute a limitation that reduces it to an absurdity. For its defies understanding why, if the Patriarchate is not a "true" religious body but a "tool" of the Soviet government, the statute suppresses only those of its churches, (and only those of its *incorporated* churches, at that), which happened to have been established *prior* to 1924.

10. The alleged status of the Patriarchate cannot justify restraints on religious liberty.

Neither the legislature nor our courts have the power to pass upon the propriety of the policies or the acts of the Patriarch; they have "no power or right to adjudicate that the incumbent is no true Patriarch * * * The Patriarch, like all men, must account for his stewardship, but not to the New York courts" (289).

The state has no power to suppress a Church because it disapproves of the political views of the head of that Church or his relation to the Caesar under whom he lives. The Constitution does not authorize restraints on churches on any such grounds. The Tudor Kings suppressed the Catholic Church but our legislatures do not have the like power to suppress the Patriarchal Church. The First Amendment forbids.

POINT II

The statute, as construed and applied by the Court of Appeals, is a taking of property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

The Cathedral was built and maintained by the Mother Church with its money for the use of its Archbishop. From the very beginning it has so been used. The Mother Church has (apart from its religious and canonical interest) a vested *property* interest in the Cathedral and its use by it and its archbishop as his *residence* and as the headquarters of the diocese. Extinction of that interest and denial of such use by statute or by judicial decision on common law grounds, would be an unconstitutional deprivation of a vested property right.

POINT III

The ruling by the Court of Appeals that the Trial Court has "discretion" to determine whether appellant Benjamin is the "proper person" or "proper trustee" to occupy St. Nicholas Cathedral, violates the guarantee of religious freedom.

If appellee is entitled to the Cathedral by force of the statute and if it is constitutional the above argument becomes academic.

But even if the statute is void, the above disposition of the case on common law lines would violate the constitutional guarantee of religious liberty. A judicial decision no less than an act of legislation which invades protected religious liberty is invalid. See *Shelley* v. *Kraemer*, 334 U. S. 1; *Backus* v. *Fort Street Union Depot*, 169 U. S. 557; *Brinkerhoff* v. *Hill*, 281 U. S. 673; *Chicago, B. & O. R. R.* v. *Chicago*, 166 U. S. 226.

The Court of Appeals ruled that, apart from the statute, the judgment in favor of appellants would have been reversed on common law grounds and a new trial ordered, with a direction that the trial court "exercise its discretion along the lines herein indicated," i. e., to determine whether Benjamin or Theophilus was the "proper trustee" who would carry out "more faithfully" the Cathedral "trust" (274).

But the civil courts have no such discretion. If the canonical archbishop is denied the right to occupy the Cathedral as a matter of discretion, there is as much an interference with an exercise of religion and a violation of the constitutional guarantee as when the same result is reached by legislative command. Canon law determines who is the proper occupant of the Cathedral—here Metropolitan Benjamin—and the civil courts have no discretion to contradict the canon law and select another in his place.

Because the ruling that such discretion exists in the civil courts is coupled with a direction for a new trial, it may lack the requisite finality for present review by this Court and it may be necessary to await the actual adverse exercise of such discretion on a new trial before it can be challenged here (*Cincinnati St. R. R. Co.* v. *Snell*, 179 U. S. 395; *Laclede Gas Light Co.* v. *Public Service Comm.*, 304 U. S. 398). But since it may be urged that such a ruling is itself a challengeable violation of the constitutional guarantee, we consider the issue on the merits.

a) The "discretion" theory of the majority, if applied to this case, is unconstitutional.

The majority below rest exclusively on *Kedrovsky* v. *Archbishop and Consistory of the Russian Catholic Church*, 249 N. Y. 75, as authority for the power of the civil courts to exercise their "discretion" to bar the appointed archbishop from the Cathedral and to select another in his place (271-2), but that case is irrelevant, and if it is deemed to advance such a doctrine, it is unconstitutional.

Unfortunately, the facts are not stated in the opinion, but the record there shows that after Evdokim left the United States in 1917, one, Alexander, assumed the role of acting archbishop. Title to about 100 Russian parish churches was transferred in his name. Unfortunately, Alexander placed mortgages on some of these parish properties and used the proceeds thereof and other parish property for his private business ventures, such as the promotion of motion picture enterprises, the purchase of apartment houses, etc.

In 1918, Kedrovsky brought a representative class action on behalf of himself and others similarly situated, alleging waste by Alexander and his associates of the above parish properties. Kedrovsky was not then, did not claim to be, and did not sue in the capacity of archbishop. He also alleged that a corporation known as Archbishop and Consistory of the Russian Orthodox Greek Catholic Church,

which he joined as a defendant in the action and which will hereafter be referred to as the Consistory Corporation, was the successor of a similarly named unincorporated association; that the latter had been the "owner" of the above parish churches, and that the Consistory Corporation had become the "owner" thereof by statutory succession. The relief sought was the appointment of a receiver, an accounting by Alexander, an injunction restraining him from further waste and a transfer of the titles of the parish properties from Alexander to the Consistory Corporation. A receiver was appointed and, pending the receivership, Alexander transferred the titles to a Board of Trustees, composed of Platon and others who later became the leaders of the metropolitan district.

Alexander's malfeasance was established and the lower court directed the titles to be conveyed, *via* the receiver, to the Consistory Corporation of which Kedrovsky in the meantime had become president.

The Court of Appeals reversed (249 N. Y. 75) on the ground that the Consistory Corporation did not have and had no right to the titles of the parish churches and that the transfer of these titles to it had been ordered on the "erroneous assumption that deeds to the corporation are nothing more than further assurance of a title already held" (at p. 76). Since the titles were nominally in Alexander, who had been adjudged derelict, or in the Board of Trustees, his grantees, who had taken *pendente lite*, the Court of Appeals had no alternative but to remit the case to the trial court to place the titles in the hands of others who would more "faithfully", that is, more honestly than Alexander, hold the titles for the use of the respective parishes.

Carrier v. *Carrier* (226 N. Y. 114), the sole authority cited in the *Consistory* opinion, reveals the limited nature of that decision. There, a husband executed a trust agreement under which he created a trust fund, consisting of real and personal property, for the benefit of his wife and

children. Thereafter the husband threatened to convert the trust assets to his personal use and, on application of the wife, the Court restrained such breach of trust and said that it had the power to remove trustees for dishonesty, insolvency or breach of trust (at 225).

St. Nicholas Cathedral was *not* one of the properties involved in the suit, nor was there any issue as to the undoubted right of the appointed archbishop to occupy it under canon law, which is the *sole* issue here and was the *sole* issue in the *Kedrovsky* case. None of the *ecclesiastical* rights or prerogatives of Alexander, as archbishop, assuming he was one, and no issues as to the exercise of his religion, were in any way involved, affected or limited by the *Consistory* decision.

The *Consistory* case thus has no point of contact whatever with the *Kedrovsky* decision, which rests solidly on the principles of *Watson* v. *Jones;* and far from casting doubt on the validity of that decision, as Judge Conway now intimates (263), the *Consistory* opinion refers to Kedrovsky as the "present archbishop" (at 76).

A civil tribunal may have supervisory power over recreant and dishonest trustees and may remove them for breach of trust; indeed, the state may punish an archbishop for his infraction of the civil or criminal law, but it has no power on that account or for any other reason, to remove an archbishop from his office, to oust him from his diocesan Cathedral, to strip him of his ecclesiastical prerogatives, to prevent him from performing his ecclesiastical duties or exercising his religion under the canon law of his church. This the First Amendment forbids.

A state may not under the guise of regulating the use of real property by trustees or others violate the First and Fourteenth Amendments (*Shelley* v. *Kraemer, supra,* at 22; *Marsh* v. *Alabama, supra*).

The "trustee" theory formulated by Judge Conway is literally based on a play on words. By the simple device of calling an archbishop a "trustee", he strips him of his

ecclesiastical prerogatives and imposes upon him burdens incident to a secular status. And, to use terms inappropriate here, he transmutes Metropolitan Benjamin from a "beneficiary" entitled to protection into an involuntary "trustee" subject to removal. Here is an application of that sterile mechanical jurisprudence which adjudicates ecclesiastical rights, not on the basis of actual canonical relations, but on the basis of rubrics and labels arbitrarily imposed. The power of the civil courts to deal with dishonest men does not enable them to prevent archbishops from exercising their religion or to violate the guarantees of religious liberty.

b) The Role of Title in The Case

Title to the Cathedral was taken in the name of a corporation of which the Russian Ambassador and the Consul General were the sole trustees (71-2, 229).[16] That corporation, in 1916, transferred the deed to Archbishop Evdokim. The petition for leave to make this transfer stated that the corporation merely held the nominal "title" and that the Cathedral was under the management and control of the appointed archbishop "subject always to the superior control of the Most Holy Synod of Petrograd, Russia" (233). Evdokim, in 1917, retransferred the deed to the grantor which, in 1925, gave the "title" to appellee (71-2,3), which gave nothing for the deed and since 1926 contributed nothing for its maintenance (160, 173). The *locus* of the title played no role in Judge Conway's decision (270). The right to occupy the Cathedral stems from canon law and not from the holder of the "title", who or which holds it subject to that law (*Watson* v. *Jones,* at 720-2). Just as Evdokim could not have been ousted by appellee's grantor, so his successor, Benjamin, may not be ousted by appellee.

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[16] There is no evidence whatever to support the assertion of Judge Conway that this corporation was the incorporation of a brotherhood organized in 1893 (253).

The fact that appellee is a corporation is a fortuitous circumstance and should not affect the merits of the case. The ecclesiastical issue would be the same, if the title were in an individual, such as the archbishop, as it was during 1916 and 1917.

No case has held or constitutionally can hold that because the "title" to the premises happens to be held by a corporation, it or its trustees may oust the canonical archbishop from a diocesan Cathedral of an hierarchal Church against the authority of the head of the Church (*Watson* v. *Jones*).

POINT IV

This Court has jurisdiction of the appeal. A federal question was involved and necessarily decided. The judgment does not rest and cannot be sustained on state grounds beyond the power of this Court to review.

A careful study of the opinions in the Court of Appeals (252-297) and of its remittitur as amended (298), leads to the conclusion that the decision did not rest on any "state ground".

At the outset it should be borne in mind that at the trial appellee's complaint was dismissed on the merits (192 Misc. 327) and that this dismissal was affirmed, though by a divided Court, in the Appellate Division (276 App. Div. 309).

Those determinations involved findings of fact as to the status of Metropolitan Benjamin and conclusions of law as to the power of the courts to deal with religious controversies and the meaning, effect and constitutionality of Article 5-C of the Religious Corporations Law.

Under New York law the power of the Court of Appeals in review of an affirmance by the Appellate Division is restricted to questions of law; it cannot make new find-

ings of fact (Civil Practice Act, Sec. 605; *Angelos* v. *Meserich*, 289 N. Y. 498). Moreover, the Court of Appeals is not vested with discretion (*Matter of Droege*, 197 N. Y. 44).

Consonant with this well settled practice the Court of Appeals had three courses open to it: it could have affirmed, ordered a new trial or, as it actually did, reverse and enter judgment for the hitherto unsuccessful party, appellee here (C. P. A. § 584).

The Court of Appeals did not affirm because the majority of the Court believed that legal error had been committed by the lower courts. These were of various kinds and colored the form of action taken. Thus, the majority concluded that the trial court should have passed on the status of the Patriarchate in Russia and determined in their discretion whether or not Benjamin was the proper person or a sufficiently "faithful" trustee to administer the Cathedral. But since that determination was one of fact, Judge Conway noted that were this view to prevail it would be necessary to remand the case to the state trial court for a new trial.[17]

But the Court of Appeals did not proceed in that manner—and, of course, if it had done so, consideration of the issues by this Court might have been postponed until after a new adverse final judgment in the state courts in the new trial had been reviewed to the allowable limits.

Instead, the Court of Appeals reversed and awarded final judgment for appellee, not for any factual reasons, which were beyond its competence, but solely because of its construction of the New York statute and its holding that it was constitutional, as construed. This was recognized by appellee in its brief at page 109 where it said: "The

[17] It may be noted, however, that even such a decision would not have rested on an adequate state ground since it would have proceeded on the assumption that state courts, contrary to the views expressed by this Court in *Watson* v. *Jones*, had the power to pass on the religious questions here involved (see pp. 47-50, *supra*).

decision appealed from was based on the statute". Had this not been so, appellee noted, a new trial would have been necessary.

That this is so appears also from Judge Conway's statement that it was "unnecessary" further to discuss the factual issues already referred to "for there is another ground requiring reversal here and judgment in favor of plaintiff" (275). That other ground is the action taken by the legislature in 1945 and 1948 which, he said, was "conclusive" (271) and completely eliminated any doubt as to the proper determination of the case "along common-law lines."

Judge Froessel in concurrence did not attempt to separate the impact of the facts and of the legislative action (285). But he expressly concurred in the opinion of Judge Conway, which he described as the "prevailing opinion" (285). While the dissenting judges criticized both the "attempted" new finding (288, 289) by the Court of Appeals and the Court's power to make it, they pointed out that the subject matter was an ecclesiastical one beyond the competence of the civil courts. They were clear in their view that the majority decision was based on the statute, that the majority holding was that the legislature had the power, and "has exercised the power", to oust the canonical archbishop from the Cathedral and they dissented because they "strongly" felt that such a statute violated the First Amendment and *Watson* v. *Jones* (286-7).

Finally the whole Court certified not only that the federal issue had been presented to it, but that it had "necessarily" passed on it (298).

The decision of the Court of Appeals which resulted in the final judgment now under review by this Court rested, therefore, *solely* on its interpretation and application of this statute, Article 5-C. Accordingly, the status of the Patriarchate in Russia, with which this Court was concerned in its order of June 9, 1952, was not and could not, under state practice, have been the basis for the decision

by the Court of Appeals awarding final judgment to appellee. Had that status been the determining factor of the Court of Appeals' dissatisfaction with the decisions of the lower state courts, it would, as Judge Conway said, have necessitated "the ordering of a new trial so that the Supreme Court might exercise its discretion along the lines herein indicated" (274).

An examination of pertinent decisions by this Court indicates that such a statement by the highest state court is considered to have controlling influence in determining whether or not its decision rested on a federal question.

Where there is doubt as to whether the decision rested on federal or state grounds, the current practice of this Court is (a) to vacate the judgment and remand the case to the state court (*Perkins* v. *Benguet Consolidated Mining Co.*, 342 U. S. 437; *Jennings* v. *Illinois*, 342 U. S. 104; *State Tax Commision* v. *Van Cott*, 306 U. S. 511; *Villa* v. *Van Schaick*, 299 U. S. 152), or (b) to continue the cause for the purpose of procuring from the state court its certificate or other expression "as to whether the judgment * * * was intended to rest on an adequate independent state ground or whether decision of the federal claim was necessary to the judgment rendered" (*Dixon* v. *Duffy*, 342 U. S. 33, 34; *Hammerstein* v. *Superior Court*, 340 U. S. 622; *Herb* v. *Pitcairn*, 324 U. S. 117; *Loftus* v. *Illinois*, 334 U. S. 804).

And the certificate or other expression of the state court that it intended to decide and necessarily decided a federal question, is sufficient to give this Court jurisdiction (*Indiana* v. *Brand*, 303 U. S. 95, 98; *Whitney* v. *California*, 274 U. S. 357, 361; *Cincinnati etc., Packet Co.* v. *Bay*, 200 U. S. 179; *Marvin* v. *Trout*, 199 U. S. 212). This is necessarily so, for this Court is hardly in a position to repudiate the assertion of the state court of its intention. Propriety requires, as this Court has said, that state courts "be asked rather than told what they have intended" (*Herb* v. *Pitcairn*, *supra*, at 128).

Here the Court of Appeals, in its amended remittitur, stated expressly that on the appeal before it "there was presented and necessarily passed upon" the constitutional question whether Article 5-C violated the First and Fourteenth Amendments and that that court held that it did not. The jurisdiction of this Court is thus unescapable.

In the *Perkins* case the decision below rested on a clear state ground but, because this Court felt that the constitutional issue discussed in the dissent of a single judge "may have influenced" the decision, it ordered vacatur and remand (at 449). And in other cases, even though the decisions rested on clear state grounds, this Court took jurisdiction because it felt the state decision was influenced by the federal issue (*Terre Haute, etc., Railroad Co.* v. *Indiana*, 194 U. S. 579, 589) or the federal right was violated in "substance and effect" (*Ward* v. *Board of Community Consumers*, 253 U. S. 17, 22).

And in another instance, even though the decision rested on a state ground, this Court continued the cause because it could also be said that it rested alternatively, "either necessarily" or "hypothetically", on a federal ground (*Herb* v. *Pitcairn, supra*, at 124-5).

It may be observed that in no recent instance has this Court refused to take jurisdiction on the ground that the decision rested on an adequate non-federal basis except where the wrong practice had been followed in the state courts (see *Woods* v. *Nierstheimer*, 328 U. S. 211; *Phyle* v. *Duffy*, 334 U. S. 431; *Hedgebeth* v. *Northcawler*, 334 U. S. 806).

And of course the state ground must be substantial, fully adequate and broad enough to sustain the judgment and wholly independent of the federal question (*Lawrence* v. *State Tax Commission*, 286 U. S. 276; *Abie State Bank* v. *Bryan*, 282 U. S. 765; *Union Pacific Railroad Co.* v. *Public Service Commission*, 248 U. S. 67).

The majority opinion does not *purport* to rest its decision on state grounds to the exclusion of the constitutional

issue. In such case, speculation as to the state grounds on which the decision *might* or *could* have been based, will not defeat the jurisdiction of this Court (*International Shoe and Iron Co.* v. *National Surety Co.*, 297 U. S. 657, 666; *Grayson* v. *Harris*, 267 U. S. 352, 358; *Indiana* v. *Brand*, 303 U. S. 95, 98).

Indeed it is impossible to conceive how, in the case at bar, it could be determined that there was a non-federal ground adequate to support the judgment. For, as we have pointed out, Judge Conway recognized that if the statute had not been controlling, the Court of Appeals would not have given judgment in favor of appellee, but would have ordered a new trial, so that the court of first instance might explore the facts further and exercise the necessary discretion vested in it alone in its dealing with trustees. Under such circumstances the jurisdiction of this Court to review the federal question has long been recognized. See *Lawrence* v. *State Tax Comm.*, 286 U. S. 276; *Williams* v. *Kaiser*, 323 U. S. 471.

On the basis, therefore, of Judge Conway's majority opinion and the statement in the amended remittitur, it is evident that the judgment here under review rested *only* on a holding that the statute was valid against a challenge that it violated the First and Fourteenth Amendments. The jurisdiction of this Court is clear. It *must* pass on the constitutionality of the statute.

Even on the basis of Judge Froessel's opinion (although it really was but supplemental in nature), the same result would follow. For that opinion made no attempt to separate the common law and statutory grounds for the conclusion reached. Both were referred to in a single sentence. The issues are, therefore, "entangled" or "interwoven" in such a way that the federal issue must be resolved by this Court (*Abie State Bank* v. *Bryan*, *supra*, at 773; *State Tax Commission* v. *Van Cott*, *supra*, at 514; *Enterprise Irrigation District* v. *Farmer's Mutual Canal Co.*, 243 U. S. 157,

164; *Marsh* v. *Alabama, supra,* Frankfurter, J., concurring, at 510).

Finally, as we have already observed, even if the case hinged only on non-statutory grounds, a federal issue concerning the power of a state to deal with the kind of religious question here involved was presented (*Watson* v. *Jones, supra*).

a) This Court Has Jurisdiction to Review the Facts

Appellants do not ask this Court to resolve conflicts in evidence. There are none. The basic facts are not in dispute.

"And this Court will review the finding of facts by a state court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts" (*Fiske* v. *Kansas,* 274 U. S. 380, 385). See also *Cresswell* v. *Grand Lodge Knights of Pythias,* 225 U. S. 246, 261; *Sterling* v. *Constantin,* 287 U. S. 378, 398). To vindicate the federal right this Court will review even *disputed* facts. Thus in *Union Pacific R. R.* v. *Pub. Service Com.,* 248 U. S. 67, this Court said that "it is the duty of this Court to examine for itself whether there is any basis in the admitted facts, or in the evidence when the facts are in dispute, for a finding that the federal right has been waived" (at 69-70).

And in *Feiner* v. *United States,* 340 U. S. 315, Chief Justice Vinson said: "In the review of state decisions where First Amendment rights are drawn in question, we, of course, make an examination of the evidence to ascertain independently whether the right has been violated" (at 316). See also *Niemotko* v. *Maryland,* 340 U. S. 268, 270; *Watts* v. *Indiana,* 338 U. S. 49, 51.

POINT V

The judgment violates procedural due process.

Apart from its invalidity as a restraint on the free exercise of religion, the judgment also violates procedural due process in the following respects.

a) The failure and refusal of the Court of Appeals to rule on the merits of appellant Benjamin's defense of limitations, while directing final judgment against him, violates due process. Title to the Cathedral was given to appellee in 1925 (204). Its possession terminated April 2, 1926 (23-4). This action was commenced April 9, 1945 (67). During these intervening 19 years appellee was continuously out of possession and made no attempt to recover the Cathedral (4, 160). Ejectment is governed by the 15 year statute of limitations (New York Civil Practice Act, sec. 34), which Benjamin pleaded (4, 161). The defense is valid on its face and this action is barred.

At the trial (67-8, 70, 78-80) and on its appeal in the courts below, appellee's *sole* (68) contention was that the statute had been tolled, i.e. the "commencement" of this action had been "stayed" (New York Civil Practice Act, sec. 24) by two injunctions: (a) an alleged unsigned *temporary* injunction, claimed to have been issued in 1926, which lapsed with the main action (67), and which the trial court excluded (80); and (b) the permanent injunction issued in the *Kedrovsky* trial in 1926. But appellee was not a party to that suit, and, in any event, it enjoined only "physical" interference with Kedrovsky's possession and did not bar summary proceedings, as appellee admitted (249) or ejectment.

The lower courts did not rule on this defense, but since they held in Benjamin's favor, it was unnecesasry for them to do so. But when the Court of Appeals rendered *final* judgment *against* this appellant, it was bound to pass on

his defense on the merits and its failure to do so is a denial of due process.

The Court of Appeals summarily dismissed this defense of limitations by saying that it was "either ignored, abandoned or found in plaintiff's favor" and has "been effectively eliminated from the case" (271).

The above statement flatly contradicts the indisputable facts. This defense was *not* "ignored, abandoned or found in plaintiff's favor". It was pleaded, it was litigated at the trial, it was pressed on the appeals to both courts below and the quoted statement is plainly mistaken.

A *fair* hearing is of the essence of due process (see *Rochin* v. *California*, 342 U. S. 165). Failure or refusal to pass on a properly raised defense denies a defendant the right to defend and deprives him of a fair hearing and thus denies him due process of law. If the right to be heard by *oral* argument is a requisite of a fair hearing (*Federal Communications Commission* v. *W. J. R.*, 337 U. S. 265, 273-7), all the more is a decision on the merits of any properly raised defense such a prerequisite. Here appellant Benjamin received from the Court of Appeals no hearing whatever, let alone a *fair* hearing, with respect to his defense of limitations.

(b) The use of the Kedrovsky record as a basis of the decision against appellants, violates due process. The majority purport to base their decision against appellants on the "evidence in the records before us" (272). The reference is to the record here and to the *Kedrovsky* record whose contents were deemed "vital to our inquiry" (253). Use of this record is sought to be justified on the ground that "it was submitted to us on the argument" (253). But this record was *not* submitted to and was not properly *before* the court below. Plaintiff's Exhibit 6A, 18 and 18A (dealing with portions of the Sobor of 1923 and Kedrovsky's appointment then), were not printed here (189, 221, 54, 155) and it was stipulated that

"with respect to Plaintiff's Exhibit 6A, 18 and 18A, the Court may be referred to copies of said exhibits appearing in the printed case on appeal" in the *Kedrovsky* record (251). Accordingly, on the argument below, appellee's counsel delivered to the Court for its convenience several copies of that record to enable the judges to have readily at hand the above three exhibits. Of course, the entire *Kedrovsky* record was not thereby "submitted" to, or placed "before" the Court, for its use and consideration as part of the evidence in the case at bar, certainly not by appellants. The *Kedrovsky* record was *not* "submitted" to, or placed "before" the Trial Court and it is not before this Court.

Of course, appellants had no opportunity to cross-examine the witnesses in the *Kedrovsky* trial or otherwise to controvert their evidence there.

Nor is that all. Judge Conway adopts and bases his decision on the self-serving claims and that version of events (not contained in our record), which were offered by the *defeated* defendants in the *Kedrovsky* trial (257-8, 260) and which were *rejected* by the Appellate Division in that case, which made contrary findings favorable to Kedrovsky (214 App. Div. at 489). In these circumstances, to base a decision adverse to appellants on evidence, deemed "vital" to the decision, found in another case not before the Court, and particularly on testimony in that case which had been rejected by the triers of the facts there, and which appellants here had no opportunity to controvert, is to violate due process.

(c) The "determinative" ground of the decision against appellants was the conclusion that the Patriarchate was not a "true" Church. But this issue was never raised at the trial, appellants were not given notice of it, and did not have a full opportunity to meet it. To decide a case on a "determinative" issue never tendered at the trial, violates due process.

(d) To decide a case on the basis of judicial notice of alleged facts, in defiance of contrary evidence in the record and contrary findings of the triers of the facts, violates due process.

Conclusion

Judge Conway's decision aims at Communism and strikes at the Russian Church. A comment in the Harvard Law Review sees in the decision "merely an indirect means of achieving an unconstitutional interference with religious freedom tacitly justified by a distaste for Communism" (64 Harv. L. Rev., 1361).

We yield to none in our opposition to Communism. The democratic world cannot be indifferent to Communism's challenge to its basic values, values which are derived from Judeo-Christian civilization and which center about the sanctity of the human spirit and the freedom of the mind. Upon that issue is there any doubt where the Russian Church stands? Patriarch Sergius emphasized the "contradiction", and the Russian bishops the "irreconcilability", between the Church and Communism. The Russian Church has kept "unsullied its canonical consciousness". It "desires to be, and feels itself to be the Church of the Russian *people*, not the Church of the Soviet *State*" (Anderson, *People, Church and State in Modern Russia*, p. 214, italics added). It is the guardian of a faith which "is impelled by forces and governed by laws of its own which not even the Kremlin understands" (Smith, *My Three Years in Moscow*, p. 279); and a danger to the Russian Church is its isolation from the West (Smith, *supra*, pp. 264-5). We submit that the decision below goes far out of its way to minister to that danger.

We have been told that our basic liberties are safe while this Court sits. Here is an opportunity for this Court to reject this resurrection of the power of the state over

churches and religion, exercised by the Tudor Kings in the past and by the totalitarians of today, and to proclaim anew the great principle, that in a democratic society governed by the First Amendment, every Church, the Russian Church included, is free to exercise its religion without dictation from Caesar.

The judgment should be reversed.

Respectfully submitted,

PHILIP ADLER,
Attorney for Appellants.

APPENDIX A

ARTICLE 5-C (New)

Russian Orthodox Churches

Sec.

105. Definitions.

106. Incorporation of Russian Orthodox churches.

107. Government of incorporated Russian Orthodox churches; powers and duties of trustees.

108. Reincorporation of existing corporations.

Article added by L. 1945, c. 693, eff. April 10, 1945.

§ 105. Definitions

The "Russian Church in America", *as that term is used anywhere in this article, refers to* [is] that group of churches, cathedrals, chapels, congregations, societies, parishes, committees and other religious organizations of the Eastern Confession (Eastern Orthodox or Greek Catholic Church) which were known as (a) Russian American Mission of the Russian Orthodox Church from in or about seventeen hundred ninety-three to in or about eighteen hundred seventy; (b) Diocese of Alaska and the Aleutian Islands of the Russian Orthodox Church from in or about eighteen hundred seventy to in or about nineteen hundred four; (c) Diocese of North America and [Alaska] *the Aleutian Islands (or Alaska)* of the Russian Orthodox Church from in or about nineteen hundred four to in or about nineteen hundred twenty-four; and (d) Russian Orthodox Greek Catholic Church of North America since

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Explanation—The amendment of 1948 added the words in italics and omitted the words in brackets.

in or about nineteen hundred twenty-four; and were subject to the *administrative* jurisdiction of the Most Sacred *Governing* Synod in Moscow until in or about nineteen hundred seventeen, later the Patriarchate of Moscow, but now constitute an *administratively* autonomous metropolitan district *created* pursuant to resolutions adopted at a general convention (sobor) of said district held in Detroit, Michigan, on or about or between April second to fourth, ninteen hundred twenty-four.

A "Russian Orthodox [Church] church", *as that term is used anywhere in this article,* is a church, cathedral, chapel, congregation, society, parish, committee or other religious organization founded and established for the purpose and with the intent of adhering to, and being subject to the *administrative* jurisdiction of *said mission, diocese or autonomous metropolitan district hereinabove defined as* the Russian Church in America. Added L. 1945, c. 693; amended L. 1948, c. 711, § 1, eff. March 31, 1948.

§ 106. Incorporation of Russian Orthodox Churches

An unincorporated Russian Orthodox church in this state may be incorporated by executing, acknowledging and filing a certificate of incorporation, stating the corporate name by which such church shall be known and the county, town, city or village where its principal place of worship is or is intended to be located. There shall be attached to such certificate the permission to incorporate signed by the metropolitan archbishop or other primate or hierarch of the Russian Church in America, or by the locum tenens acting in his place. Such certificate of incorporation shall be executed and acknowledged by six lay members of such church.

On filing such certificate such church shall be a corporation by the name stated in the certificate. Added L. 1945, c. 693, eff. April 10, 1945.

§ 107. Government of incorporated Russian Orthodox [Church] *churches;* powers and duties of trustees

1. Every Russian Orthodox church in this state, whether [heretofore or hereafter] incorporated *before or after the creation of said autonomous metropolitan district,* and whether incorporated or reincorporated pursuant to this article or any other article of the religious corporations law, or any general or private law, shall recognize and be and remain subject to the jurisdiction and authority of the general convention (sobor), metropolitan archbishop or other primate or hierarch, the council of bishops, the metropolitan council and other governing bodies and authorities of the Russian [Orthodox] Church in America, pursuant to the statutes for the government thereof adopted at a general convention (sobor) held in the city of New York on or about or between October fifth to eighth, nineteen hundred thirty-seven, and any amendments thereto and any other statutes or rules heretofore or hereafter adopted by a general convention (sobor) of the Russian [Orthodox] Church in America and shall in all other respects conform to, maintain and follow the faith, doctrine, ritual, communion, discipline, canon law, traditions and usages of the Eastern Confession (Eastern Orthodox or Greek Catholic Church).

2. The six lay members of every church incorporated pursuant to this article signing the certificate of incorporation and the rector shall be the trustees of such church for the first year or until their successors are selected according to the by-laws of such church or the rules and usage of the Russian [Orthodox] Church in America.

3. The trustees of every Russian Orthodox church shall have the custody and control of all temporalities and property, real and personal, belonging to such church and of the revenues therefrom and shall administer the same in accordance with the by-laws of such church, the normal

statutes for parishes of the Russian [Orthodox] Church in America approved at a general convention (sobor) thereof held at Cleveland, Ohio, on or about or between November twentieth to twenty-third, ninteen hundred thirty-four and any amendments thereto and all other rules, statutes, regulations and usages of the Russian Church in America. Added L. 1945, c. 693; amended L. 1948, c. 711 § 2, eff. March 31, 1948.

§ 108. Reincorporation of existing corporations

Any heretofore incorporated Russian Orthodox church may reincorporate under the provisions of this article, by filing in the office of the county clerk in the county in which its principal place of worship is located, a certificate, signed by the trustees in office at the time of such reincorporation, or by the majority of them, setting forth that they desire to reincorporate under the provisions of this article, the corporate name by which such church shall be known, the county, town, city or village where its principal place of worship is located and the number and the names of the trustees who are to hold office until the next annual meeting of said church. Immediately upon the filing of such certificate all the right, title, equity and interest of such church in any estate, real or personal, together with all franchise and charter rights, shall be vested in the body corporate and politic so created under this article and the original incorporation of such church shall be null and void. Added L. 1945, c. 693, eff. April 10, 1945.

APPENDIX B

Statement of the Russian Bishops quoted in Anderson, *People, Church and State in Modern Russia*, pp. 91-94.

"Those who have signed the present statement are fully aware of the difficulty of establishing mutual friendly relations between the Church and State under present actual conditions. They cannot be silent regarding this. It would not be true, it would be beneath the dignity of the Church, and besides it would be quite useless and unconvincing to assert that there were no points of discord between the Orthodox Church and the State authority of the Soviet Republic. But these points of discord lie not at all in the matters designated by the political distrust of the State; it is not at all in points ascribed by the calumny of the foes of the Church. The Church stands aloof from the new repartition of wealth, the nationalization of property; that has always been considered by it as the domain of the state, for the conduct of which it is not responsible. The Church also stands aloof from the political organization of authority, for it is loyal to the governments of all the countries within the limits of which it has its own members. It lives at peace with all the different types of state organization, beginning with such despots as were formerly in Turkey and ending with such Republics as the North American United States. The discord lies in the irreconcilability of the religious teaching of the Church with the materialism and the official philosophy of the Communistic Party and of the government of the Soviet Republic directed by that party.

The Church recognizes the existence of the spiritual principle; Communism denies it. The Church believes in the living God, Creator of the world, Guider of its life and fate; Communism does not admit His existence, believes

that the world was self-organized and that no reasonable principles or purposes govern its history. The Church sees the aim of man's life in the heavenly calling of the spirit, and never ceases reminding her children of their heavenly fatherland. She does this even when the conditions of outward culture and material well-being are at their height. Communism desires to know no other aim for man except his welfare upon earth. And this difference of ideology and philosophical viewpoint which exists between the Church and State manifests itself also in the realm of practical everyday life and in that of morality. The Church believes in the steadfast principles of morality, justice and law, Communism looks upon them as the conditional results of class-struggle, and values moral questions only from the standpoint of their usefulness. The Church instils the feeling of that humility which elevates man's soul; Communism abases man through his pride. The Church protects purity and the sacredness of childbirth. Communism sees but the satisfying of instincts in the marriage tie. For the Church religion is not only the living force enabling man to attain his heavenly destiny, but also the source of all that is greatest in human relation; which is the foundation of earthly welfare, happiness, and the health of nations. For Communism religion is the opium that drugs the nations, that weakens their energy; that is the source of their poverty and misfortunes. The Church wants religion to flourish. Communism wants it to perish. With such deep difference in fundamental principles separating the Church and State, it becomes impossible that an inner nearness or reconciliation could exist between them. There can be no reconciliation between assertion and negation, between yes and no. For the very soul of the Church, the circumstance of its existence and the reason for its being, is just that which is categorically denied by Communism.

By no compromise or concession, by no partial changes in its teaching, by no explanation of it in a communistic

spirit can the Church attain such a reconciliation. Pitiful attempts have been made in this direction by the "Regenerated" in the Church; some of them have tried to instil into the soul of the faithful the idea that Christianity and Communism are really similar in all important points; that a communistic state is striving to attain the same objectives as the Gospels, only by different means, i.e., not by religious persuasion, but by force. Others again have recommended reviewing Christian dogmatics in such a way as to present the teaching of the relations of God to the world in a manner that should not resemble the relation of a sovereign to his people, but should stand more in accordance with republican ideas. Others again have insisted that all saints of bourgeois origin should be excluded from the calendar and deprived of the veneration shown to them by the Church. All such attempts are not sincere and they have called for the deep indignation of the faithful.

The Orthodox Church will never stand on this unworthy path. It will never deny either the whole or part of that teaching which has come down to it from all that has been holy in the past centuries, in order to accommodate ever-shifting popular opinions. When the ideological difference of opinion between the Church and the state is so deep, it is unavoidable that it should be reflected in the everyday life of both these organisms. A conflict in the activity of both can be avoided only by the strict carrying out of the law regarding the separation of the Church from the state. According to this law the Church must in no wise mix itself in the activity of the civil government, which has to take care of the material welfare of the people. Neither must the state hinder the Church in its religious and moral activity.

Such a law was among the first issued by the revolutionary government; it has been incorporated into the constitution of the U.S.S.R., and might have, up to a certain point, satisfied both sides, now that the political system has been

so much modified. There are no religious motives preventing the Church from accepting it. Our Lord Jesus Christ has ordered us to give unto Caesar what belongs to Caesar, i.e., the material welfare of the people is the realm of the government. He left no commandments to His followers to seek to alter the forms of government or to guide its activity. According to the teaching and traditions of the Orthodox Church it has always stood aloof from politics, and has remained obedient to the state in all that did not concern its faith. That is the reason why it was able to remain loyal to the civil government both in former Turkey and in the ancient Roman Empire, even when it was quite alien to the government spiritually. A contemporary state can demand no more of it. A contemporary state, in opposition to former political theories, does not find it necessary that the political union of its citizens should be strengthened by an inner religious unity. It does not consider this of importance, and openly declares that it does not need the aid of the Church to attain the aims set before it, and that it allows its citizens complete religious liberty.

As things stand at present the Church only desires a systematic and complete carrying out in actual life of the law which separated the Church from the State".

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Supreme Court of the United States

October Term, 1952

No. 3

JOHN KEDROFF and BENJAMIN FEDCHENKOFF, as Archbishop, etc.,

Appellants,

v.

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF ON REARGUMENT

PHILIP ADLER,
Attorney for Appellants.

Supreme Court of the United States

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v.

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF ON REARGUMENT

1. We find it difficult to deal with appellee's brief, not because it presents any irrefutable arguments, but because it makes so many self-serving assertions without support in the record. For the relevant facts we must turn to appellants' brief which, it is to be noted, appellee does not challenge in any material respect.

2. In the *Waipa* case, Theophilus transferred one of his priests from Yonkers to another parish. The priest refused to leave and the court held, and properly so, that the priest had to obey his bishop. Benjamin was not a party to the suit and made no claim to the priest or the church; Benjamin's status could not possibly have been involved therein. Appellee's assertion that in that case "the courts sustained had the authority of Theophilus, as against Benjamin, over a local church property" (its brief, p. 29), is clearly erroneous and we are confident appellee will acknowledge this. The *Yonkers* case does not have the remotest bearing on the right of the canonical archbishop

to occupy the Cathedral and a consideration thereof can serve no legitimate purpose here.

3. Appellee's discussion of the alleged "old" and "new" diocese is wholly arbitrary. The report by Benjamin in 1933 that "our North American Diocese has begun official existence" is merely a statement that the Patriarchal Church has resumed its functions here and is not an indication that the Patriarch had abandoned his authority over the diocese. On the contrary, he suspended Platon and appointed Benjamin archbishop thereof.

4. The record shows (122-123):

> "Excuse me. There is no evidence there was any pledge of loyalty. It is a question of agitation in the churches against the government.
>
> Mr. Arkush: When I say a 'pledge of loyalty' I mean that pledge which his Eminence has testified to . . .
>
> A. Loyalty is understood as refraining from politics only . . . Both in church and in the name of the Church."

Notwithstanding this, appellee repeats its unfounded claim that there was a demand that the local clergy pledge loyalty to the Soviet government. Due regard for the facts requires avoidance of such misuse of language.

5. Tikhon was imprisoned in 1923, therefore the Patriarchate is not a true religious body in 1945, says appellee (its brief, p. 30). Appellee is welcome to this kind of argument. Although it now tries to resuscitate the remains of the Renovated Church, it acknowledged on the previous argument that it "is extinct to-day" (its main brief, p. 13).

6. Appellee says: "In the absence of a formal inquiry and explicit finding by the legislature, the Court of Appeals properly resorted to presumption" (its brief, p. 29). Here is a novel principle indeed. If there is anything one desires

which is lacking in a statute, all one has to do is to supply the deficiency by presumption. Appellee applies this principle with a vengeance; it presumes the existence of anything which serves its purpose.

7. Appellee acknowledges that the legislature "determined" that the rules of the metropolitan district were to be the governing "canon law" of the Russian Church (its brief, p. 43). That is the point precisely. Under the First Amendment, the legislature has no power to "determine" or prescribe what the canon law shall be.

(a) *Watson* v. *Jones*, because it *enforced* the canon law, did not interfere in the internal affairs of the church. But the Kentucky court did interfere in the internal affairs of the church (and this Court so declared), when it *rejected* the canon law and decided the case by rules of its own, by its own views of how the church should be governed. In such a case, a civil court literally writes the canon law of the church, a task which the courts are professionally unequipped and constitutionally unauthorized to perform (13 Wall. at 728-9, 732-4). The ruling in *Watson* v. *Jones* that the canon law of a church, as pronounced by its chief authorities, is "final", is "not examinable" in, and is "binding" on the civil courts, derives from the "structure of our government" and is "founded in a broad and sound view of the relations of church and state under our system of laws" (*ibid.*, 727, 730-1).

(b) There will be a minimum of religious disputes if the courts are told to let the canon law alone—to enforce the canon law as they find it—and to make no effort to rewrite it. The rule in *Watson* v. *Jones* is thus one of economy and least action for the courts. But even if it were not, this Court cannot abdicate its function to vindicate a federal right. Basic rights "should not be curtailed because of reluctance to decide constitutional questions" (*Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 286, 321).

(c) If, for example, a civil court, by command of a statute or otherwise, were to subject St. Nicholas Cathedral to the jurisdiction of the Pope, is there any doubt that such a judgment would violate the guarantee of religious liberty and be reviewable in this Court? In our case the canon law is clear and indisputable. The appointed archbishop has the exclusive right to occupy the cathedral and to officiate there. But, in open defiance of the canon law, the judgment ejects him from the Cathedral and prohibits him from conducting religious services there. What clearer case can there be of a violation of a federal right, of a curtailment of the free exercise of religion in contravention of the First Amendment? In the face of this commanding fact all of appellee's contentions come to nothing.

8. Appellee says: "Concededly, the judgment is based on the statute; and the court did purport to pass on the federal question" (its brief, p. 46). This, of course, refutes its claim that the judgment may be sustained on state grounds. Whether the statute, as construed, is constitutional is a federal question. Appellee's pallid claim that the federal question is "unsubstantial", cannot be taken seriously. The clash of opinion in the courts below, the extraordinary result achieved, and the revolutionary theory on which it is based, show that the issue is not merely substantial but wholly unprecedented. "No other decision reaching such a result can be found in the books".

The judgment should be reversed.

Respectfully submitted,

PHILIP ADLER
Attorney for Appellants

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950 52

No. 717 3

JOHN KEDROFF AND BENJAMIN FEDCHENKOFF, ETC.,

Appellants,

vs.

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH OF NORTH AMERICA

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

RALPH MONTGOMERY ARKUSH,
Counsel for Appellee.

INDEX

Subject Index

Page

I. No substantial federal question is presented as to the validity of the statute sustained below under the First and Fourteenth Amendments (guaranteeing freedom of religion) 2

A. The statute fits into the historic pattern of legislation in New York on the subject of religious corporations .....

B. The legislative finding (Rel. Corps. L., § 105) that the metropolitan district created in April, 1924, was *de facto* identical with the diocese then existing, is supported by the evidence 3

C. The legislative mandate (Rel. Corps. L., § 107 subd. 1 and 3) does not affect any churches founded since April, 1924, with the intent of adhering to the administration of the patriarchate 5

D. The legislature is deemed to have found and to have known the circumstances which forced the American Church to declare its temporary autonomy and the process by which the patriarchate has been subjugated by the Russian government and used as its tool 6

E. The legislature must be deemed to have found that the declaration of administrative autonomy in April, 1924, was compelled by circumstances beyond the control of the American faithful .. 7

F. The legislature must also be deemed to have found that the American Church has been compelled, by circumstances beyond its control, to insist on maintaining its administrative autonomy .. 7

Page

G. The legislature must be deemed to have found that the patriarchate has been subjugated to the Communist masters of Russia to such an extent that it is no longer capable of functioning as the head of a free international religious body 8
1. No new finding 9
2. Evidentiary support 9
3. Contrary testimony of little weight 11
4. No express contrary findings by lower courts 15
5. The American Church has never waived its contention that the Soviet dominated patriarchate is disqualified to act as its administrative superior 15

H. The legislative mandate (Rel. Corps. L., § 107) is a reasonable exercise of the power, for the common welfare, to ascertain the administrative authority which may be relied upon to carry out more effectively and faithfully the purposes of a religious "trust" 17

I. The validity of the statute may also be based on the cy près prerogative of the sovereign 21

J. Legislative action was called for because of the difficulties of obtaining evidence technically competent in judicial proceedings 22

K. The statute does not purport to decide any ecclesiastical question 23

L. Mandate of the statute is in the historic American tradition 24

M. The mandate of the statute is in the historic Orthodox tradition 26

Page

N. The appellant Benjamin has shown no abridgement of his religious freedom 27

Note 27

II. No substantial federal question is presented as to the validity of the statute under the Fourteenth Amendment (securing vested property rights) 28

III. No substantial federal question is presented by the fact that this action was commenced one day before the statute became effective 30

IV. No substantial federal question is presented by the remarks of the Court of Appeals in regard to what would be the disposition of the case in the absence of the statute 31

V. No substantial federal question is presented by the alleged failure of the Court of Appeals to rule on the defense of limitations 31

Table of Cases

Aktieselskabet etc. v. *W. A. Kirk & Co.*, 180 Misc. 979 30

American Communications Ass'n v. *Douds*, 339 U. S. 382 6

Bellfort v. *Tooker*, 21 N. Y. 267 18

Bird v. *Merkles*, 144 N. Y. 544 18

Blatch v. *Archer*, K.B. Cowp. 66 10

Canovaro v. *Brothers of Hermits of St. Augustine*, 326 Pa. 76 28

In re Free Church of St. Barnabas, 41 Berks 215 22

Girard v. *Philadelphia*, 7 Wall. 1 28

Grupe v. *Rudisill*, 101 N. J. Eq. 145 19

Hartford Baptist Church v. *Witherell*, 3 Paige 296 18

Jennings v. *Scarvorough*, 56 N.J.L. (27 Vroom) 401 19

Kedrovsky v. *Rojdesvensky*, 242 N. Y. 547 ..... 7, 32

Kedrovsky v. *Russian Catholic Church*, 249 N. Y. 75 ..... 7, 18

Krauczunas v. *Hoban*, 221 Pa. 213 20

Page

Levy v. *Levy*, 33 N. Y. 97 ..... 17, 18
Will of Lott, 193 Wis. 409 22
Miller v. *Gable*, Ct. Ch. 2 Denio 492 24
Novickas v. *Krauczunas*, 240 Pa. 248 21
People's Bank v. *St. Anthony's R. C. Church*, 109 N. Y. 462 3
Pine Grove Poultry Farm v. *Newtown B-P. Mfg. Co.*, 248 N. Y. 293 30
Presbyterian Congregation v. *Johnston*, 1 W. & S. (Pa.) 9 26
Reformed Bethanien Church v. *Ochsner*, 72 So. Dak. 150 19
Reformed P. D. Church v. *Mott*, 7 Paige 77 17
Roberts v. *Bradfield*, 12 App. D. C. 453 3
Robertson v. *Bullions*, 11 N. Y. 342 ..... 2, 18
St. Joseph's Hospital v. *Bennett*, 281 N. Y. 115 17
Saint Nicholas Cathedral etc. v. *John Kedroff et al.*, 276 App. Div. 309 9
Saint Nicholas Cathedral etc. v. *John Kedroff et al.*, 302 N. Y. 16 ..... 4, 6
Sherman v. *Richmond House Co.*, No. 2, 230 N. Y. 462 22
Matter of Trustees of N.Y.P.E. Public School, 31 N.Y. 547 3
Trustees of Pencader Presbyterian Church v. *Gibson*, 19 Del. Ch. Ap. 375 19
United States v. *Carolene Products Co.*, 304 U. S. 144 6
Waipa v. *Kushwara*, 283 N. Y. 780 7
Walker Memorial Baptist Church v. *Saunders*, 285 N. Y. 462 2
Wallace v. *Trustees of General Assembly*, 201 Pa. 929 19
Watson v. *Jones*, 13 Wall. [80 U. S.] 679 ..... 15, 18, 20
Westminster Presbyterian Church v. *Presbytery*, 142 App. Div. 855 28
Westminster Presb. Church v. *Presbytery*, 222 N. Y. 612 30
Williams Estate, 52 Pa. D. & C. 107 22

Statutes and Other Authorities

	Page
Anderson: People, Church and State in Modern Russia	6
Casey: Religion in Russia	6, 26
Census of Religious Bodies, 1936	
Curtiss: Church and State in Russia	6
Emhardt: Religion in Soviet Russia	6
Fedotoff: The Russian Church since the Revolution	6
Fortescue: The Orthodox Eastern Churches	26
Gsovski: Legal Status of the Church in Soviet Russia, 8 Fordham L. Rev. 1	7, 12, 14
Lowndes: Vindication of Anglican Orders	24
McCullagh: The Bolshevik Persecution of Christianity	6
Miliukov: Outlines of Russian Culture: Part I, Religion and the Church	6
New York Times, extracts from articles	12-14
Pares: History of Russia	26
Restatement of Trusts	17
Scott on Trusts	
Spinka: The Church and the Russian Revolution	6
Stokes: Church and State in the United States	24
Sumner: Survey of Russian History	26
Timasheff: Religion in Soviet Russia	6, 14
USSR: A Concise Handbook	11
Wall Street Journal, extracts from articles	14
Zollman: American Church Law	26
Civil Practice Act (N. Y.):	
§ 24	31
§ 34	33
§ 35	33
§§ 245, 245-a, 245-b	30
3 Greenl. 188	2
1 Jones & Varick 104	2
L. 1784,* c. 18	2

* The abbreviation L., followed by a year, refers to the session laws of New York.

	Page
L. 1813, c. 60, §§ 1, 2	2
L. 1817, c. 239	3
L. 1822, c. 187	2
L. 1863, c. 45	2
L. 1867, c. 265	2
L. 1871, c. 12	3
L. 1873, c. 149	3
L. 1873, c. 222	3
L. 1873, c. 633	2
L. 1875, c. 79, § 4	18
L. 1877, c. 263	3
L. 1880, c. 371	3
L. 1886, c. 16	2
L. 1890, c. 103	3
L. 1895, c. 723	3
L. 1909, c. 53	2
L. 1943, c. 145	27
L. 1943, c. 405	3
Personal Property L. (N.Y.), § 12, subd. 2	21
Real Property L. (N.Y.):	
§§ 92-93	31
§ 113, subd. 2	21
Religious Corporations Law of 1895 (N.Y.), §§ 50, 51	3
Religious Corporations Law of 1909 (Consol. L. N.Y., c. 51)	2
§ 5	18
§§ 90 and 91, renumbered 95 and 96	3
§ 105	3, 28
§ 107	5, 17
Russia: Decree of January 23, 1918, § 12	11
Russia: Instruction of People's Commissariat for Interior, October 1, 1929, No. 328, § 5	12

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 717

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH OF NORTH AMERICA,

Plaintiff and Appellee,

against

JOHN KEDROFF AND BENJAMIN FEDCHENKOFF, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church,

Defendants and Appellants.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT IN OPPOSITION TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 12, paragraph 3, of the Rules of this Court, the appellee files this statement disclosing the matters and grounds making against the jurisdiction of the

Court as asserted by the appellants and hereby moves to dismiss the appeal or to affirm the judgment appealed from.

I

No Substantial Federal Question Is Presented as to the Validity of the Statute Sustained Below under the First and Fourteenth Amendments (Guaranteeing Freedom of Religion).

A. *The statute fits into the historic pattern of legislation in New York on the subject of religious corporations.*

The "wall of separation between Church and State" has not prevented the state of New York from providing, at an early date (L. 1784, c. 18; 1 Jones & Varick 104), for an orderly method for the administration of properties dedicated to the use of religious groups and to preserve them from exploitation by those who might divert them from the true beneficiaries of the trust. From time to time religious corporations connected with various denominations were separately provided for, e.g. Episcopal (3 Greenl. 188, L. 1813, c. 60, §1); Dutch Reformed (*ibid*, § 2); Presbyterian (L. 1822, c. 187); Roman Catholic (L. 1863, c. 45); Methodist (L. 1867, c. 265); Baptist (L. 1873, c. 633); Lutheran (L. 1886, c. 16), etc. The Religious Corporations Law (Consol. L., c. 51; L. 1909, c. 53, as amended) names over thirty of the principal denominations.

The incorporated parish bodies so provided for, having to do with *temporal* affairs only, are to be distinguished from the *spiritual* bodies (congregations) with which they are interrelated (*Walker Memorial Baptist Church* v. *Saunders*, 1941, 285 N.Y. 462, 472). But the members of the congregation, or worshippers, do constitute the members of the corporation, whether or not they have the right to elect trustees or other officers (*Robertson* v. *Bullions*, 1854, 11

N.Y. 342; *People's Bank* v. *St. Anthony's R. C. Church*, 1888, 109 N.Y. 512).

Cathedrals have usually been incorporated by special act (*cf.* L. 1817, c. 239; L. 1843, c. 149; L. 1873, c. 222; L. 1877, c. 263; L. 1880, c. 371; L. 1890, c. 103; L. 1943, c. 405). By analogy to parish corporations, the members of a cathedral corporation would be all of the worshippers in the diocese or other jurisdiction of which the cathedral is the see.

The earliest provision for Orthodox parish corporations was made in 1871 (L. 1871, c. 12). The incorporators and trustees were limited to the Russian ambassador and consul general. The enactment became §§ 50 and 51 of the Religious Corporations Law of 1895 (L. 1895, c. 723) and §§ 90 and 91 of the 1909 law, later renumbered as §§ 95 and 96.

In thus concerning itself with religious corporations the state does not interfere with religion (*cf. Roberts* v. *Bradfield*, 1898, 12 App. D.C. 453, 471) but discharges its responsibility as supreme guardian of property devoted to religious uses (*cf. Matter of Trustees of N.Y.P.E. Public School*, 1864, 31 N.Y. 574, 592). In this capacity the state grants the corporate franchise to the temporal bodies, permits them to become vested with estates in perpetuity for their corporate purposes and regulates their administration of the temporalities with which they have been endowed.

On its face, then, Article 5-C indicates no violation of fundamental rights.

B. *The legislative finding (Rel. Corps. L., § 105) that the metropolitan district created in April, 1924, was* de facto *identical with the diocese then existing, is supported by the evidence.*

The appellants failed to prove that the metropolitan district known as Russian Orthodox Greek Catholic Church of North America and created at the Detroit Sobor of April,

1924 (which district will be referred to as the American Church), did not comprehend every church in the North American Diocese as it then existed. It is true that 6 delegates voted against the creation of a temporarily self governing body and 2 abstained (931[1]), but there is no evidence that their churches, or those which did not send any delegates, attempted later to maintain administrative relations with the Moscow patriarchate. After Metropolitan Benjamin arrived in 1933 he may have founded some new churches and there may have been some attempted defections from the American Church to him. Judge Conway credits him with 13 parishes (302 N.Y. at p. 16), which is more credible than his own figure of 50, which he failed to substantiate (678-680). It is significant that not a single church is listed in the United States government report on local congregations compiled as of 1936 (*Religious Bodies—1936: Statistics, History, Doctrine, Origin and Work*, Bureau of the Census, 1941) as being under the administrative jurisdiction of the patriarchate. This is eloquent evidence that Benjamin found no patriarchal churches here on his arrival.

De facto, at any rate, then, the diocese became the American Church and, as a diocese, ceased to exist. This was virtually admitted by the patriarchate when it quoted Benjamin as reporting in 1934 that "our North American Diocese has begun official existence" (1107). Judge Conway correctly refers to Benjamin's jurisdiction as a "new diocese" (302 N.Y. at pp. 16, 20).

The appellants' assertion that the churches represented at Detroit in 1924 "had belonged to a larger group" is not supported by the evidence and is contrary to the legislative finding as to the historic fact.

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[1] Numbers in parentheses refer to the folios of the printed "Case on Appeal".

C. *The legislative mandate (Rel. Corps. L., § 107 subd. 1 and 3) does not affect any churches founded since April, 1924, with the intent of adhering to the administration of the patriarchate.*

The appellants read the statute as "dispossessing" the Patriarchal Church "from all its properties" and "preventing any of its churches from existing in this state"—and, again, as "outlawing a Church in its entirety"—and, again, as suppressing the Patriarchal Church—and the like.

No such effect can be read into the statute or derived from the judgment below.

The term "Russian Orthodox church," as used in the statute, is a word of art, limited to "a church, cathedral * * * founded and established for the purpose and with the intent of adhering to, and being subject to the administrative jurisdiction of said mission, diocese or autonomous metropolitan district hereinabove defined as the Russian Church in America." (§ 105).

The mandate contained in § 107 applies only to a "Russian Orthodox church" as that term is defined in § 105. Therefore the mandate does not apply to churches founded since April 2-4, 1924, with the intent of adhering to the patriarchal administration. There is no proof that any of Benjamin's churches were founded before that date. In fact there is no proof that Benjamin has any churches in the state today.

In no sense does the statute "outlaw" the Patriarchal Church, "suppress" it or "dispossess" it of its properties. Only a property—like the cathedral here—which had been dedicated prior to April, 1924, and of which Benjamin had obtained *de facto* control since, would be affected.

Benjamin and all of his followers are left free to worship in any buildings which were not part of the diocese on April

2-4, 1924. That this is a reasonable limitation on his rights will be shown below.

D. *The legislature is deemed to have found and to have known the circumstances which forced the American Church to declare its temporary autonomy and the process by which the patriachate has been subjugated by the Russian government and used as its tool.*

In ascertaining the factual background of legislation the Court is not limited to the evidence or findings in the record before it or even to facts of which it may take judicial notice according to the technical rules. It may consider "any state of facts either known or which could reasonably be assumed" (Jackson, J., concurring and dissenting, each in part, *American Communications Ass'n* v. *Douds*, 1950, 339 U. S. 382 at p. 423 n. 1, quoting from opinion of Court in *United States* v. *Carolene Products Co.*, 1938, 304 U. S. 144, 154; see, also, opinion of Conway, J., below, 302 N. Y. at pp. 30-33).

In 1945 and 1948 considerable information on the Church in Russia had been published by reputable scholars.[2]

The legislature was also possessed of facts of general knowledge in regard to "the character and method of operation of international communism and the Soviet attitude toward things religious" (302 N. Y. at pp. 32-33).

The records of the Court of Appeals were also accessible to the legislators. Three times, prior to the present action, that Court had considered the problems of the American

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[2] See, for example, J. S. Curtiss: *Church and State in Russia*, 1940; W. C. Embardt: *Religion in Soviet Russia*, 1929; F. McCullagh: *The Bolshevik Persecution of Christianity*, 1924; M. Spinka: *The Church and the Russian Revolution*, 1927; R. P. Casey: *Religion in Russia*, 1946; G. P. Fedotoff: *The Russian Church Since the Revolution*, 1928; N. S. Timasheff: *Religion in Soviet Russia*, 1942; P. Miliukov: *Outlines of Russian Culture—Pt. I, Religion and the Church*, 1942; P. B. Anderson: *People, Church and State in Modern Russia*, 1944.

Church arising out of the changed conditions in Russia (*Kedrovsky* v. *Rojdesvensky*, 1926, 242 N. Y. 547; *Kedrovsky* v. *Russian Catholic Church*, 1928, 249 N. Y. 75; *Waipa* v. *Kushwara*, 1940, 283 N. Y. 780).

E. *The legislature must be deemed to have found that the declaration of administrative autonomy in April, 1924, was compelled by circumstances beyond the control of the American faithful.*

It is unnecessary to repeat here the circumstances, which are graphically related by Judge Conway. Suffice to point out that the delegates were confronted with a double peril, the loss of their ruling bishop, Platon, accused of acts of "counter-revolution" *i.e.*, publicly expressed disapproval of the Soviet regime (336; *cf.* Gsovski: *Legal Status of the Church in Soviet Russia*, 8 Fordham L. Rev. 1, 25-29), on the one hand and, on the other, the seizure of all the church properties by the schismatic Kedrovsky, representing a group that had declared "capitalism to be a mortal sin, and a battle with capitalism to be holy to Christians" (typewritten copy of Plaintiff's Exhibit 6A, p. 1). In either event the diocese would be dominated by the atheistic Bolshevik government. "The debate * * * showed the unanimous desire of the members of the Sobor to keep our American Church from Soviet interference" (927).

F. *The legislature must also be deemed to have found that the American Church has been compelled, by circumstances beyond its control, to insist on maintaining its administrative autonomy.*

On each occasion of negotiations for restoring the spiritual unity which had been broken by unilateral action of the patriarchate, the subjection of that office to the Kremlin has compelled the American Church to insist on administrative

autonomy. Benjamin himself testified at the trial that the policy of the central church authorities to require an obligation of loyalty to the Soviet regime from the clergy outside Russia had continued to the present time (659-660). Even although "loyalty" means only refraining from public disapproval of the Communist rulers, it is an impossible condition for American citizens.

The American Church is a member of the newly formed National Council of Churches. Imagine its position if it were administratively subject to the patriarchate and asked to subscribe to a statement, say, condemning slave labor in the U.S.S.R.!

G. *The legislature must be deemed to have found that the patriarchate has been subjugated to the Communist masters of Russia to such an extent that it is no longer capable of functioning as the head of a free international religious body.*

On this issue (which the Court of Appeals characterized as "determinative" apart from the statute, 302 N. Y. at p. 22), the members of that court, and of the Appellate Division, appear to have divided, not so much as to the actual facts, but as to the propriety of presuming knowledge in the legislature.

If there is one fact today which can be said to be within the common knowledge—of judges, of legislators, of every literate person in the world, on either side of the Iron Curtain—it is the all pervading pressure of the Communist state on the persons within its power.

> "Even the intellectual and spiritual ties by which men are held together, are so controlled by the totalitarian state as ultimately to disintegrate all autonomous groups outside of the state itself, or the single political party that rules it. That technique is applied to scientific and cultural as well as to religious groups,

so that ultimately no autonomous group with any independence remains. In the final analysis, the state and the state alone becomes all. It involves a retreat from reality if we do not clearly see that. In this case the technique of suppression, and the attempted use of a religious group merely as an instrumentality to serve the all-embracing and dominant ends of the Soviet state, is the real issue presented. The so-called 'Russian church at large', so frequently mentioned by respondents, is in reality and unfortunately the Russian church group whose high ranking functionaries have been completely subjected and dominated by the men who control the Politburo, and the relatively small group that constitutes 'the party', through whom the vast millions in Russia and Soviet-dominated satellite countries are regimented and controlled."

Van Voorhis, J., dissenting, below, 276 App. Div. at p. 331.

The appellants, as well as the dissenting opinion in the Court of Appeals (302 N. Y. at p. 37), object to the statements in the prevailing opinions on the subject as amounting to a new finding, without evidentiary support in this record, and in the face of contrary testimony, and express contrary findings by both courts below. It will be shown that on all of these counts the appellants and the dissenting judges are mistaken.

1. *No new finding:* The Court of Appeals did not purport to make a new finding but merely presumed a legislative finding on the subject.

2. *Evidentiary support:* Naturally the appellee did not issue letters rogatory to examine Patriarch Alexy on the subject! As Mr. Justice Van Voorhis (276 App. Div. at p. 332) quoted from Lord Mansfield:

"It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the

power of one side to have produced and in the power of the other to have contradicted."

Blatch v. *Archer*, 1774, K.B., Cowp. 66, quoted in 2 Wigmore on Evidence, § 285.

Nevertheless, there is sufficient evidence in the record to sustain the presumption of a legislative finding.

From the day when Patriarch Tikhon was arrested, the record shows that the central church authorities have been permitted to act only as mouthpieces of the government. From 1922 to 1927 the central office of the Patriarchal Church was suppressed (510-512). The only functioning officials in that period were the schismatics who had declared "capitalism to be a mortal sin, and a battle with capitalism to be holy to Christians." The Government had arrested thousands of priests and bishops to help this group (550-553). After the Patriarch was released from prison he was confined to a monastery, became sick, had heart attacks (905). Under these circumstances he issued, with his Synod, an ukase dismissing Metropolitan Platon because of "acts of Counter-Revolution directed against the Soviet power" (1098-1099). This act of Tikhon was doubtless performed under duress (723; 920-921). In 1927 Sergius gave a pledge of loyalty to the State (489-490) and demanded a similar pledge from all the clergy abroad (612; 614-615). In that same year Stalin told the American Trade Union Delegation that the trouble was only that the reactionary clergy were not yet fully liquidated (1035). This statement reflected the position of the Government (521-522).

The policy requiring loyalty to the Soviet regime from the clergy outside the USSR has continued to the present time (659-660). Why should that be, if the Patriarch is free?

Metropolitan Benjamin advised Alexy just prior to his election as Patriarch that an essential condition of reunion between the mother church and the American Church was

the fullest loyalty to the Soviet power (660). Why so, if the patriarchate was free?

The patriarchate has repeatedly refused to recognize the autonomy of the American Church (1097-1121; 1081-1088; 684-685; 826). Why this insistence on retaining administrative control over a few hundred parishes in America while full autocephaly was granted to the Orthodox Church of Georgia (1239)? Obviously, because the Kremlin does not need an intermediary to control the Church in one of the constituent republics of the Soviet Union.[3] No reason, other than a political one, appears for granting full independence to this presumably large body and not even an autonomous status to the American.

3. *Contrary testimony of little weight:* There is no more significant proof of the subservience of the central church dignitaries to the Soviet power than the testimony of Metropolitan Gregory (829-832). He is a permanent member of the Holy Synod (813).

His testimony is indeed a roseate picture. It is somewhat marred by the following facts, all of which are in evidence:

(a) More than half of the churches in Russia were closed at the beginning of the Revolution, the number diminished from year to year; before the last war it was only one-tenth of the former number (585);

(b) No religious tracts were distributed in Russia (589);

(c) The separation [of Church and State] was in fact a robbing of the Church and depriving it of all activities (582);

(d) No religious society in Russia has the right to own private property or to enjoy the right of a juridical person (840; Decree of January 23, 1918; §12;

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[3] As of July 1, 1941, the estimated population of the Georgian republic was 3,722,252 of which 67.7% was of Georgian origin (*USSR: A Concise Handbook*, Cornell Univ. Press, 1947, pp. 6-7).

Gsovski: *Legal Status of the Church in Soviet Russia*, 8 Fordham L. Rev. 1, 10 n. 46);

(e) The civil law of Russia does not recognize the Church as an associated body, the governing organs of which have jurisdiction over the lower units; the latter are autonomous and need not obey the orders of the former (338-342; Instruction of the People's Commissariat for the Interior of October 1, 1929, No. 328, §5; Gsovski, *op. cit.*, p. 9, n. 43);

(f) The Soviet Government did not permit a lay delegate of the American Church to attend the Moscow Sobor of 1945 and prevented the two clerical delegates from arriving on time (1049-1054).

Metropolitan Gregory's testimony that the Patriarchal Church is functioning freely without interference by the civil authorities might be literally true and still the Patriarch and his synod might be puppets of the Kremlin. Witness the recent announcements by the patriarchate as published in its own journal or in the press.[4]

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[4] "*Paris*, April 1—A new campaign to stamp out religious influence in the Soviet Union is reported to be under way. This drive apparently is directed against minor and local clergy and not against the top hierarchy of the Russian Orthodox Church, which is completely and officially in sympathy with the Communist Government.

* * * * * * * * *

The top of the Sovet [sic] orthodox hierarchy meanwhile has become so active in its open support of the Government that its official publications are now engaged in heated attacks on the Western powers and definitely mixing in lay politics.

The last issue of the Journal of the Moscow Patriarchate to reach here contained a long diatribe against so-called United States and British 'war mongers' in an article entitled 'The Devilish Spirit of a New Aggression Threatening the People's Peace' * * *."

The New York Times, April 2, 1948.

"*Moscow*, Aug. 6—Alexius, Orthodox Patriarch of Moscow and all Russia, declared today that the excommunication of all persons support-

Let it be assumed that, as reported in The New York Times of April 2, 1948, "the top hierarchy of the Russian Orthodox Church * * * is completely and officially in sympathy with the Communist Government." Then when its official publications, as reported in the same article, engage "in heated attacks on the Western powers," the hierarchy is simply expressing its feeling of "sympathy"; it is not suffering "restraint", "molestation" or "interference".

So, again the Church might be functioning "freely" in Russia, even although it had been deprived of substantial means, its clergy reduced in social position, its authority to teach religion to children restricted and its organizational type changed from associated to congregational (Tima-

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ing Communism 'would fundamentally contradict the main tenets of the orthodox Christian faith.'

Alexius' statement was published in Izvestia, Government newspaper, along with a series of questions eliciting it that had been submitted by a Reuter's news agency correspondent in Moscow.

Alexius furthermore declared there could be no conflict between loyalty to the Soviet state and loyalty to the Russian Orthodox Church.

'Such a conflict,' he said, 'not only does not exist but also cannot exist if believing people will adhere to the precise meaning of the evangelical commandments and testaments of the Apostles.'

* * * * * * *

The declaration by the Patriarch of Moscow on the question of a conflict between the Soviet state and the church asserted that 'to this question there can be only one answer.' This was reminiscent of a statement by Alexius somewhat more than a year ago when, on being asked whether there was any conflict between the theory and practice of communism on the one hand and religious belief on the other, he replied: 'The Orthodox Church has no conflicts whatsoever within the Soviet state.'

At that time he declared that freedom of religion was guaranteed by the Soviet Constitution, that the number of churches was increasing and that 'from Stalin the church has received a favorable support on all church questions that arise.'

* * * * * * * *"

The New York Times, August 7, 1949.

sheff: Religion in Soviet Russia, p. 24-28; 38-45; 49-53; Gsovski: Legal Status of the Church in Soviet Russia, 8 Fordham L. Rev. 1 *et seq.*). In other words, it might be "freely" exercising the narrowly curtailed functions which it was permitted to retain.

But the appellants offered no proof to the effect that the Patriarch and the members of his synod were not completely *controlled* by the Government. Churches might be open for worship, parish priests might be conducting services, even seminaries and academies might be educating candidates for the ministry, and still the top hierarchy might be only a department of the Soviet Government, wholly subject to the will of the civil power. That is the fact which the appellants have failed to disprove and, therefore, the legislature is deemed to have found.

The legislature may not have taken the Soviet brand of religious "freedom" at its face value.

> "* * * The persecution of Christianity in Russia in the years following the revolution was communism at its most honest. The later 'freedom' of religion—with its back broken—was communism at its most deceitful." (Editorial in Wall St. Journal, Feb. 14, 1949).
>
> "* * * The church has again an official place in the Soviet Union, but as an agency of the state; on the same terms the religious leaders being imprisoned and executed as 'traitors' in the countries under Soviet control would be tolerated. When Caesar is also God there can be no divided tribute." (Anne O'Hare McCormick, The New York Times, April 8, 1950).

The appellants stress Sergius' mention of the "contradiction which exists between us Orthodox and the Communist Bolsheviks, who govern our Union" (1030). That was said on June 10, 1927. But according to The New York Times of August 7, 1949, Patriarch Alexy, on being asked whether there was any conflict between the theory and prac-

tice of communism on the one hand and religious belief on the other replied: "The Orthodox Church has no conflicts whatsoever within the Soviet state."

4. *No express contrary findings by lower courts:* The trial justice did not mention the subject.[5] The prevailing opinion in the Appellate Division contained no affirmative finding on the subject, but contained these words (276 App. Div. at p. 318):

> "* * * we disagree with the conclusion drawn as to the nonexistence of the Russian Orthodox Church in Russia, because we believe that we may not draw that conclusion on this record, even if we might desire to do so."

The Appellate Division was of the opinion that the dealings between the American Church and the patriarchate precluded any finding that the Church in Russia was nonexistent. The dissent in the Court of Appeals also contains a remark that the "plaintiff itself seems not to cast so cold an eye on the Patriarch" (302 N.Y. at p. 38).

5. *The American Church has never waived its contention that the Soviet dominated patriarchate is disqualified to act as its administrative superior:* Both the majority in the Appellate Division and the minority in the Court of Appeals fail to distinguish between the *spiritual* and *administrative* qualities of the office of Patriarch.

The name *Patriarch of Moscow and All Russia,* to a Russian Orthodox, stirs sentiments of pride and reverence, quite apart from his estimation of the particular incumbent.

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[5] The appellants allege that the issue was not raised at the trial. The appellee did give fair warning through its counsel that the political conditions in Russia would be used as an argument that the doctrine of denominational control (*Watson* v. *Jones,* 1871, 13 Wall. [80 U. S.] 679) should be modified in this case, apart from the statute (264-267; 277-280). The appellants' counsel expressly referred to this argument and attempted to meet it (527-528; 541-542; 583-601; 829-830).

He is required, in his liturgical worship, to pray for the head of the Church, as well as for all of the other Patriarchs of the East and other hierarchs. The Court may note that when the witness Fedotov testified under cross-examination that the official book "The Truth About Religion in Russia" was "untruth" and was asked

> "Q. You say the Patriarch of Moscow published untruths, is that it?"

he replied

> "A. It is against my feeling, but I must" (577).

This feeling of reverence for the spiritual office is shown throughout the record. The American Church never broke off spiritual communion with the Patriarch; it was the patriarchate that laid an interdict on the American Church.

But at the same time the American Church has always safeguarded its *administrative* independence. It has insisted on the right of self government.

The gist of the matter is this: that in his *spiritual* quality the Patriarch continues as head of the Church, no matter how subjugated or servile, but as *administrative* head he is disqualified so far as concerns the American Church.

Parenthetically, he has also lost his function as administrative head of the Church in Russia, for that body has become of the congregational type by force of Russian civil law (338-342).

The Appellate Division misunderstood the position of the American Church in regard to the Patriarch and his synod. To treat Alexy as a "holy man" 276 App. Div. at p. 319 because he is occupying an office of great symbolic value does not disentitle the American Church from refusing to accept him and his synod as a supreme administrative organ. The King of England is accepted by the members of the Commonwealth as a symbolical, not administrative, head.

The Appellate Division alluded to the Church in Russia or the Patriarchate being "restored" since 1945 (276 App. Div. at pp. 319-320). There is no such proof in the record. The Russian Church, as an authentic, real, valid branch of the Orthodox communion, has continuously existed, as has the office of Patriarch or patriarchal *locum tenens*, since the Revolution, although from 1922 to 1927 the central office was suppressed.

The real question is whether a top hierarchy, which can function other than as a department of the Soviet Government, has been restored. The appellee contends that it has not, and that the American Church has never dealt with it as if it had.

The Court, therefore, is not precluded by any acts of the American Church from presuming a legislative finding that the top hierarchy, because they are willing and servile tools of the Kremlin, are disqualified to function as the administrative superior of the American Church.

H. *The legislative mandate (Rel. Corps. L., § 107) is a reasonable exercise of the power, for the common welfare, to ascertain the administrative authority which may be relied upon to carry out more effectively and faithfully the purposes of a religious "trust".*[6]

This is a proper field of legislative action.

"* * * Throughout our whole existence, learning, piety and benevolence—every truly charitable object

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[6] The words "trust" and "trustee" in this connection are not used in a technical sense. A gift to a religious corporation for its general purposes does not create a technical trust (Restatement of Trusts, sec. 348, intro. Note; 3 Scott on Trusts, § 348.1; *ibid.*, 1950, Supp.; *St. Joseph's Hospital* v. *Bennett*, 1939, 281 N. Y. 115, 121). The corporation takes "the whole legal and equitable interest in the gift" (*Levy* v. *Levy*, 1865, 33 N. Y. 97, 116; *Reformed P. D. Church* v. *Mott*, 1838, Ct. Ch., 7 Paige 77,

—has been amply encouraged, the result being attained through the medium of corporate bodies created by the legislative power * * *

* * * In all civilized societies, the dissemination of religion and charity, are objects to justly engage the attention of the law making power; but it is a necessity of the subject that trusts or uses for the promotion of these objects, which affect the public interests and well being, should be created under legislative sanction and control. * * *"

Levy v. *Levy*, 1865, 33 N. Y. 97, 112, 115.

Under normal circumstances the administrative authority which "may be relied upon to carry out more effectively and faithfully the purposes" of a religious "trust" (opinion below, 302 N. Y. at pp. 14, 21, 24, 30, quoting from opinion in *Kedrovsky* v. *Russian Catholic Church*, 249 N. Y. at pp. 77-78) is the governing body, if any, to which the religious corporation is subject, according to the discipline, rules and usages of the denomination with which the corporation is connected. A statutory provision applicable to all religious corporations commands such denominational control (L. 1875, c. 79, § 4, now Rel. Corps. L., § 5) [7] and it is the law generally, apart from statute (*Watson* v. *Jones*, *supra*).

However, the rule of denominational control is not to be read into the First and Fourteenth Amendments as an inflexible restraint on legislative action, "not subject to change or modification by the same legislature which an-

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52; *Bird* v. *Merkles*, 1895, 144 N. Y. 544, 551). There is no separation of legal and beneficial ownership, since the members of the corporation are identical with the worshippers to whose use the property has been dedicated.

[7] Before this enactment in 1875 religious corporations could administer their properties in accordance with their own by laws, regardless of denominational rules (*Robertson* v. *Bullions*, 1854, 11 N. Y. 243; *Hartford Baptist Church* v. *Witherell*, 1832, 3 Paige 296; *Bellfort* v. *Tooker*, 1859, 29 Barb. 256, aff. *sub nom. Petty* v. *Tooker*, 1860, 21 N. Y. 267).

nounced it, in cases where literal enforcement would be unreasonable and opposed to the public interest" (302 N. Y. at p. 30).

Even without legislative action, the rule of denominational control is not inflexible.

> "* * * it may well be that the civil courts will interfere in a case where it is shown that the controlling authority of a general church has indisputably abandoned fundamental and characteristic doctrines and beliefs to the diversion of church property from the objects and purposes of the implied trust to which it is subject. Mack *v.* Kime, 129 Ga. 1, 58 S. E. 184, 24 L. R. A., N. S., 675; 23 R. C. L. 449."
>
> *Trustees of Pencader Presbyterian Church* v. *Gibson*, 1941, 19 Del. Ch. Ap. 375, 391, 22 A. 2d 782, 789.

Also, even without the aid of a statute, the courts are not always bound to accept the ruling of a church judicatory.

> "We think it doubtful whether the Supreme Court [in *Watson* v. *Jones*] intended to announce a principle without limitation or exception. It seems probable that when the occasion arises it will align itself with the courts which have limited the application of its announced principle. See 24 L. R. A., N. S., 698."
>
> *Reformed Bethanien Church* v. *Ochsner*, 1948, 72 So. Dak. 150, 165, 31 N. W. 2d 249, 257.

For cases where the courts have refused to be bound by the action of church bodies, see

Grupe v. *Rudisill*, 1827, 101 N. J. Eq. 145, 165;
Wallace v. *Trustees of General Assembly*, 1902, 201 Pa. 292;
Jennings v. *Scarvorough*, 1894, 56 N. J. L. (27 Vroom) 401.

When it is clear that the ecclesiastical tribunal lacked jurisdiction, its ruling is not binding on the civil court,

e.g., if a church court imposed a death sentence for murder (*Watson* v. *Jones*, 13 Wall. at pp. 732-733). It is clear that the patriarchate had no jurisdiction to restrict the civil liberties (freedom of speech) of the American clergy. Metropolitan Benjamin could cite no authority for requiring "loyalty" from the clergy outside Russia other than the words of Jesus "Render unto Caesar", etc., but he was not permitted by the trial court to explain what Jesus would have said if there had been two Caesars (653-655). The American clergy should not be required to give double allegiance.

This thought can be no better expressed than in the words of the American Church in the statement explaining the rejection of the Patriarchal ukase of February 16, 1945 (1076-1078):

> "* * * The American Church is flourishing in the atmosphere of democratic freedom. It was no fault of the American branch of the Russian Orthodox Church that by force of circumstances it was compelled to establish its own church administration. It was no fault of the American Church that the Patriarchate laid a suspension on it because its clergy declined to give a pledge of loyalty to the Soviet power.
>
> It is an American Church and an American Church it must continue to be."

In the case of religious trusts the state law is supreme.

> "* * * the law, whose supremacy, over all ecclesiastical rules and regulations, when rights of property are concerned, is not to be questioned."
>
> *Krauczunas* v. *Hoban*, 1908, 221 Pa. 213, 225, 70 Atl. 740.

In the case last cited a Pennsylvania statute required lay control of church property, although the rules of the Roman Catholic Church required the property to be held by the

bishop. The court compelled the bishop to convey the parish property to the congregation. When the bishop sought to evade the effect of this decree by laying an interdict on the congregation, who were thus compelled to use a non-Catholic minister for their services, the court refused to enjoin such use of the property (*Novickas* v. *Krauczunas*, 1913, 240 Pa. 248, 87 Atl. 686).

The legislature, therefore, acted reasonably in designating the American Church, rather than the patriarchate, as the "trustee" which "may be relied upon to carry out more effectively and faithfully the purposes of this religious trust" i.e. the administration of the properties which were part of the diocese prior to April 4, 1924, or dedicated to the American Church since then.

I. *The validity of the statute may also be based on the cy près prerogative of the sovereign.*

This point was not stressed by the Court of Appeals but was mentioned in the dissent in the Appellate Division (276 App. Div. at p. 338).

As the successor to the prerogative of the English Crown, the *parens patriae*, the state may exercise the *cy près* power in a manner similar to the judicial exercise authorized by statute (Real Property L. § 113, subd. 2; Personal Property L. § 12, subd. 2). In the present case it is to be presumed that the donors of the premises intended that it be used for the benefit of members of St. Nicholas parish or the North American diocese, as the case might be, in accordance with the faith, dogma, doctrine, canons, discipline, rules and usages of the Russian Orthodox Church. As has been shown, no trust in a technical sense arose from those gifts but the appellee is bound to use the gifts for the purposes intended by the donors as presumed from the language of the gifts, unless circumstances have so changed as to render

impracticable or impossible a literal compliance with that intent. For example, in a case where the charter of an Episcopal church provided that on dissolution the assets should go to some other Episcopal church in the neighborhood but there was an adequate supply of such churches, the court decreed that the assets should go to the Episcopal diocesan board of trustees for missionary and extension work (*In re Free Church of St. Barnabas,* 1949, Pa. C.A. Berks Co., 41 Berks 215; *cf. Sherman* v. *Richmond House Co. No. 2,* 1921, 230 N.Y. 462).

This is a situation apt for the application of *cy près.* The intent of the donors may still be carried out except in one particular, viz., administrative control by the authorities in Russia. Compliance with that term has become impracticable, because of the subjection of the Moscow dignitaries to the Soviet regime.

The circumstances have changed, therefore, to such an extent that the legislature may exercise the *cy près* prerogative (*cf. Will of Lott,* 1927, 193 Wis. 409, 412-414; *Williams Estate,* 1944, Orphans Ct. Tioga Co., 52 Pa. D. & C. 107, 111-112).

3. Legislative action was called for because of the difficulties of obtaining evidence technically competent in judicial proceedings.

The courts of New York had been burdened with legislation over Russian Orthodox church properties for a quarter of a century.[8] The obstacles to obtaining evidence in Russia without the cooperation of the Soviet government were insuperable. The situation demanded legislative action. The legislature was not hampered by technical rules of

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[8] Besides the three cases which reached the Court of Appeals there were many suits in the lower courts.

evidence. It could act on a mass of information, however obtained.

K. *The statute does not purport to decide any ecclesiastical question.*

The appellants would have it appear that the legislature was concerning itself with questions of canon law. This is not so. The statute deals solely with the custody and administration of the temporalities of incorporated churches, cathedrals, etc.

Nevertheless it may not be amiss to answer briefly the aspersions cast by the appellants on the canonical position of the American Church and its place in the Apostolic Succession.

The canonical position is based on the ukase of Patriarch Tikhon, No. 362, of November 20, 1920 (889). It was referred to at the Detroit Sobor although the speaker inadvertently dated it in 1921 (923-924). It has been consistently relied on through the years (350-351; 761-763; 1228-1232). It was not limited to dioceses in Russia and was applicable to the North American diocese.

The adherence of the American Church to the Russian Church Abroad (Karlovci-Munich Synod) was to stop the confusion arising from parallel jurisdictions (1205-1214). The connection has been ended and is of no moment here.

The appellants need not worry as to the Apostolic Succession. That doctrine transmits the sacerdotal grace through the sacrament of Holy Orders irrespective of censures, interdicts or even excommunication. For example, the Papacy recognized ordinations in England even while the English Bishops were under interdict. In his brief *Regimini Universalis*, October 30, 1555, Pope Paul IV declared that only those Bishops and Archbishops who were not ordained and consecrated in the form of the Church

cannot be said to have been validly and lawfully ordained [in the reigns of Henry VIII and Edward VI]" (1 Lowndes: *Vindication of Anglican Orders,* p. 59). If Pope Leo XIII had not recognized the possibility of the Apostolic Succession being retained by, in his eyes, a schismatic and heretical Church, he would not have issued his bull *Apostolicae Curae,* September 15, 1897, appointing a commission to examine into the validity of Anglican orders (2 Lowndes, *op. cit.,* appendix, p. vii *et seq.*).

But, in any event, as has been shown, Article 5-C compels no one to join the American Church. It does prevent a foreign government from seizing its properties.

L. *The mandate of the statute is in the historic American tradition.*

It would amaze Madison and Jefferson to learn that the doctrine of religious liberty was being invoked to help a foreign bishop, the puppet of a totalitarian state, to seize control of American church property! There was widespread opposition in the colonies, even among Anglicans, to receiving English bishops, on account of their close connection with the English government (1 A. P. Stokes: *Church and State in the United States,* pp. 231-240).

It was the existence of the state controlled churches in Europe and in various colonies that led to the cry for religious freedom. The political independence of America was soon followed by the independence of the American churches.

"From being *appendages of national churches in Europe,* they now become national churches themselves in this new Empire" (from a letter of Rev. Edward Livingston, quoted in Stokes, *op. cit.,* vol. I, p. 720). The Dutch Reformed were connected with the Church in Holland (Stokes, *op. cit.,* vol. I, pp. 749-752; *cf. Miller* v. *Gable,* 1845, Ct. Ch., 2 Denio 492, 511). Other churches with European connec-

tions were the German Reformed (1 Stokes, p. 748), Lutherans (*ibid.*, p. 765), Moravians (*ibid.*, pp. 774-775), as well as, of course, the Episcopalians. All of these became independent after the Revolution.

It is true that the Church of England consecrated bishops for the American Episcopal Church. Even so, if the rule of denominational control had been pushed to the extreme point contended for by the appellants here, a single parishioner could have insisted on the continuance of the ancient connection.

> "* * * Public opinion would not have borne it [such a result]. Yet every Episcopal congregation in America had been founded on the basis of that connexion, and our independence in other matters had raised no unanswerable objection to its permanence, especially, after the Bishop of London had procured an act of Parliament to dispense with engagements by the American Episcopal clergy that would have interfered with their political allegiance. It is true that the separation was effected with the assent of the mother church; but it was the parishioner here, and not the church abroad, whose consent was necessary to a dissolution of his ecclesiastical relation, in order to impair his civil rights. Besides, the consent of the mother church was only formal, and given to the separation as to a measure which she could not prevent. She indeed conferred the episcopate, and thus secured a continuance of the apostolic succession to the American Episcopal Church; but that might have been had from the nonjuring bishops in Scotland, as it was by Doctor Seabury, or from the Danish Episcopal church, which indeed offered it on terms of signing the thirty-nine articles of the church of England, with the exception of their political parts. Had the offer been accepted, there would have been an adverse withdrawal of ecclesiastical allegiance—in principle the very case before us—and it will not be pretended that the majority of an Epis-

copal congregation here would not have been at liberty, in that event, to form a connexion with an independent Episcopal church government, without forfeiting the interest of each in the church property."

Presbyterian Congregation v. *Johnston*, 1841, 1 W. & S. (Pa.) 9, 39.

In other words, the rule of denominational control is not so inflexible as not to yield to political changes (*cf.* Zollman: American Church Law, rev. ed., 1933, p. 239).

M. *The mandate of the statute is in the historic Orthodox tradition.*

The Eastern Church has never had the cohesion of the Western (Roman Catholic). Administrative ties have been readily broken as the result of political conditions. The Russian Church itself existed for over a century as a *de facto* independent body without the consent of its *de jure* superior authority (opinion of Van Voorhis, J., below, 276 App. Div. at pp. 341-342; R. P. Casey: *Religion in Russia*, 1946, p. 7; B. H. Sumner: *Survey of Russian History*, 2d ed., 1947, p. 185; B. Pares: *History of Russia*, 1937, p. 83). The modern Orthodox Churches of Serbia, Albania, Roumania and Bulgaria broke off administrative ties with the Patriarch of Constantinople without his blessing and in the face of his interdict, as the result of their countries winning political independence from Turkey.

"* * * as soon as ever a Balkan State gets independent of the Sultan it makes its Church independent of the Patriarch * * * So it has became a regular principle that wherever there is a free State, there shall be a free and independent National Church."

A. Fortescue: *The Orthodox Eastern Churches*, 1929, c. XI.

N. *The appellant Benjamin has shown no abridgement of his religious freedom.*

He is free to exercise his religion without restraint. But he is not permitted to occupy St. Nicholas Cathedral. The legislature has decreed that the American Church is a more reliable "trustee" of that property than the Moscow patriarchate. There are facts supporting the reasonableness of that determination.

NOTE

The appellants make much of an act passed in 1943 and signed by Governor Dewey (L. 1943, c. 145), relating to the so-called Federated Orthodox Greek Catholic Primary Jurisdictions in America. No evidence as to this organization appears in the record. It is evidently a dead letter, without the adherence of the American Church. However, as the dissent in the Court of Appeals brings in a speech of Governor Dewey delivered in 1943 in which he referred to Metropolitan Benjamin as the successor of the rulers of the American mission and diocese (302 N. Y. at p. 44), it may be permissible to quote a recent letter from the Governor to the present head of the American Church.[9] The Governor has evidently revised his opinion of the chief appellant.

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[9] Metropolitan Theophilus died after the argument in the Court of Appeals.

State of New York
EXECUTIVE CHAMBER
Albany

Thomas E. Dewey
Governor

December 22, 1950.

Archbishop Leonty
Russian Orthodox Greek Catholic Church
of North America
Holy Virgin Protection Procathedral
59 East 2nd Street
New York, New York

DEAR ARCHBISHOP LEONTY:

I have your gracious telegram conveying greetings from the Eighth All-American Sobor of Russian Orthodox Greek Catholic Church of North

II

No Substantial Federal Question Is Presented as to the Validity of the Statute under the Fourteenth Amendment (Securing Vested Property Rights).

The dedication of property to religious use, by absolute gift to a religious corporation, vests no property rights in any members of the corporation or of the general body with which the corporation is connected (*Westminster Presbyterian Church* v. *Presbytery*, 1911, 142 App. Div. 855, 875; *Girard* v. *Philadelphia*, 1868, 7 Wall. 1, 14; *Canovaro* v. *Brothers of Hermits of St. Augustine*, 1937, 326 Pa. 76, 88-96). The corporation itself has full ownership, subject to the duty of applying the property to the use intended by the donors.

In the case at bar, the intended use was, in the first instance, as a place of worship and parish house for the local congregation, later as a central place of worship and administrative center for the whole diocese as it existed prior to April 1924. The actual identity of that diocese with the present American Church has been determined as a fact by the legislature (Rel. Corps. L. § 105). When, therefore, the legislature requires that St. Nicholas Cathedral be administered subject to the American Church the ownership

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America. I was happy to be able to sign the Acts of the New York State Legislature in 1945 and 1948 which confirmed the members of the Russian Orthodox Greek Catholic Church in the possession of Saint Nicholas Cathedral in New York City, thus freeing it from the evil and sacrilegious influence of representatives of the Soviet.

I join you in looking forward to the time when all worshippers of the Orthodox Greek Church in the world will be free from the clutches of the Soviet Government.

Sincerely yours,

THOMAS E. DEWEY.

TED:RM.

of the property is not being taken from one group and vested in another. The ownership has always been in the appellee or its grantor subject to being used for the religious needs of the members of the respective corporations. Those members, as has been shown above, are made up of the whole body of worshippers, in the first instance, of the local congregation, then from 1905 to 1924 all of the worshippers in the diocese, from 1924 on all of the worshippers in the American Church.

The appellants contend that ownership vested in the Russian Orthodox Church "at large," meaning the whole Russian Orthodox Church throughout the world. They fail to cite any authorities establishing such a doctrine under the law of the state. The decided cases, even those upholding the statutory requirements of denominational control, give no indication that the full ownership of the property of a religious corporation is vested in anyone other than the members of the corporation. For example, in *Westminster Presbyterian Church* v. *Trustees of Presbytery*, 1918, 222 N. Y. 642, the plaintiff church was, in an ejectment action, adjudged to have record title and right of possession subject to the provisions of the article in the Religious Corporations Law relating to Presbyterian churches.

In decreeing that St. Nicholas Cathedral should be administered subject to the control of the American Church, the legislature did not deprive the Russian Church "at large," or Metropolitan Benjamin, or the Moscow hierarchy whom he represents, of property without due process of law; none of them had any property rights in the premises; the full ownership was in the plaintiff.

There is no proof as to the proportions in which the Russian Government and Church contributed to the cost of the premises. The Czar may have given much the larger share. At any rate no resulting trust was created.

III

No Substantial Federal Question Is Presented by the Fact That This Action Was Commenced One Day Before the Statute Became Effective.

When the action was commenced the sole defendant was the appellant Kedroff who was then occupying the property under a claim of right as representative of the schismatic Renovated Church. As against the appellee he had no color of right, statute or no statute. The canonically invalid status of the Renovated Church had become a matter of history.

The appellant Benjamin did not appear in the case until two years later. He then filed an answer, later amended, to the amended complaint which had been served on Kedroff on April 26, 1945. It is possible that when Benjamin intervened a supplemental complaint should have been served on him alleging the enactment of Article 5-C (Civil Practice Act, §§ 245, 245-a, 245-b), although usually a public domestic statute need not be pleaded (*Pine Grove Poultry Farm* v. *Newtown B.-P. Mfg. Co.*, 1928, 248 N. Y. 293, 297). If this was a defect, it may be corrected or disregarded at any stage of the action (C.P.A., § 105; *cf. Aktieselskabet etc.* v. *W. A. Kirk & Co.*, 1943, N. Y. Co. Sp. T., 180 Misc. 979, 981). In any event, the appellee has properly been adjudged the owner in fee. Its title and right of possession are subject to the provisions of the Religious Corporations Law as now existing (*Westminster Presb. Church* v. *Presbytery*, 222 N. Y. 612). That law, in § 107, defines the duty of the appellee's trustees, which is to administer the property in accordance with the rules of the American Church.

IV

No Substantial Federal Question Is Presented by the Remarks of the Court of Appeals in Regard to What Would Be the Disposition of the Case in the Absence of the Statute.

These remarks (302 N. Y. at p. 24) were not the ground on which the judgment was based. They lack the finality required for review either on appeal or on petition for certiorari.

V

No Substantial Federal Question Is Presented by the Alleged Failure of the Court of Appeals to Rule on the Defense of Limitations.

Prior to the motion for reargument in the Court of Appeals appellants had attempted to argue in all of the courts that the legal estate had vested in Benjamin as the "accredited Archbishop", pursuant to the statute of uses (Real Prop. L., §§ 92-93). As the appellants had consistently referred to Kedrovsky as an "accredited Archbishop" their argument would have resulted in vesting the legal estate in him also. Had they continued to maintain this position they might have argued, with some color of plausibility, that the possession of Kedrovsky from 1926 to 1934 and of his son Nicholas Kedroff from 1934 on (assuming that the father and son were in privity, as to which there is some question) was continuously adverse to the appellee's title and had ripened into a title by adverse possession to which Metropolitan Benjamin succeeded. That being the appellants' position it would have been necessary for the plaintiff to rely on the tolling of the statute under C.P.A. § 24.

However, on the motion for reargument the appellants expressly abandoned the position that the statute of uses

executed the legal estate in Metropolitan Benjamin, or, inferentially, in his predecessors. The appellants said (moving brief, pp. 18-19):

> "* * * There is no dispute about * * * the identity of the actual trustee in this case. Plaintiff holds the legal title, and is therefore the trustee of the cathedral. * * * Metropolitan Benjamin does not claim title or seek its transfer * * * There is nothing to prevent the exercise by plaintiff of its functions and prerogatives as sole and undisputed trustee of the cathedral * * * "

A similar concession is made in the Jurisdictional Statement.

Necessarily, the appellants must take the same position as to Metropolitan Benjamin's predecessors in occupancy. There is no proof that John Kedrovsky or Nicholas Kedroff made any claim of title or right of possession, adverse to the *legal title* of the plaintiff. In fact the very proof offered by the appellants in this case shows that Kedrovsky's occupancy was subject, and not adverse, to the title of the legal owner. At folios 396-398 the defendants' counsel introduced in evidence Finding of Fact No. 5 in the case of *Kedrovsky v. Rojdesvensky*, which read:

> "Title to the premises * * * are [*sic*] in the Russian Orthodox Saint Nicholas Cathedral [*sic*], a domestic, religious corporation, subject to a trust for the uses of said Russian Orthodox Church and the members thereof * * * "

The finding, of course, referred to the appellee's predecessor in title, since the appellee had not yet been created at the time when the earlier case was tried. But the finding does conclusively show that the right of occupancy awarded to Kedrovsky was *subject to the legal title*. Hence, occupation of the premises by Kedrovsky must be deemed to have

been, not adverse, but under and in subordination, to the legal title of the appellee (C.P.A. § 35[illegible] and the appellee, while not in actual occupancy, must be deemed to have been seized of the premises within fifteen years of the commencement of this action (§ 34).

The foregoing argument was presented to the Court of Appeals in the appellee's brief in opposition to the motion for reargument and was replied to by the appellants.

The question of whether the statute of limitations had been tolled by the injunctions against Platon and against the appellee had also been fully briefed on the main argument.

Since the court's attention was thus called to the defense on the motion for reargument, the denial of that motion must be deemed a ruling on the defense. The court was not required to express its views in an opinion.

Respectfully submitted,

RALPH MONTGOMERY ARKUSH,
Counsel for Appellee.

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October Term, 1951

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JOHN KEDROFF and BENJAMIN FEDCHENKOFF,
as Archbishop, etc.,

Appellants,

v.

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR APPELLEE.

RALPH MONTGOMERY ARKUSH,
Counsel for Appellee.

Pandick, Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

SUBJECT INDEX.

	PAGE
INTRODUCTORY	1
OPINIONS BELOW	5
JURISDICTION	6
STATEMENT	6
Parties	6
Issues Raised by Pleadings	7
Statute Involved	8
Factual Background of Legislation	8
Eastern Confession	9
Church of Russia	10
North American Mission or Diocese Before 1924	11
Suppression of Patriarchate by Bolsheviks: Schism of the Renovated	11
Patriarch Ukase No. 362	14
Titles to American Church Properties Jeopardized by John Kedrovsky	14
Appointment of Platon as Ruling Bishop	15
Purported Dismissal of Platon by both Patriarchal and Renovated Authorities	15
Founding of Saint Nicholas: First a Parish Church, then a Cathedral	17
Platon Sued by Representatives of Renovated Church	17
Russian Church in America Created at Detroit Sobor of 1924	18
Cathedral See of *Russian Church in America*	24
Trial and Decision of *Kedrovsky* v. *Rojdesvensky* at Special Term	24
Incorporation of Appellee and Transfer of Title to it by St. Nicholas' Corporation	26
Argument and Decision of *Kedrovsky* v. *Rojdesvensky* on Appeal	29
Attempt by Appellee to Oust Kedrovsky and Injunction Against Appellee	31

PAGE

Injunction Against Metropolitan Platon 32
Requirement of "Loyalty" to Soviet Regime 33
Church in Russia Becomes Congregational in Polity by Force of Soviet Decree 34
Action of Court of A[illegible]als in *Kedrovsky* v. *Russian Catholic Church* 35
Interdict Against Platon and Appointment of Benjamin as Ruling Bishop 35
Election of Theophilus; Interdict Against Him; Adoption of Parish and Church Statutes 38
Yonkers Case 38
Failure of Negotiations with Patriarchate 38
Use of Moscow Patriarchate as Instrument of Propaganda 45
Summary of Argument 46

ARGUMENT:

POINT 1. As a basis for its determination that the accustomed beneficiaries should enjoy their traditional houses of worship under the administrative control of the governing authorities of the *Russian Church in America*, rather than that of the envoy of the Moscow patriarchate, the legislature is to be presumed to have acted reasonably in tracing and identifying the beneficiaries of religious trusts, in preventing a diversion of the trust properties and in deciding which trustees might be relied upon to carry out more effectively the purposes of the trusts 53

A. The finding of the legislature that the *Russian Church in America* was identical in fact with the North American diocese, as it existed at the time of the Detroit sobor of 1924, was not contradicted by the evidence and should be accepted by this Court 54

B. The legislature is to be presumed to have found upon sufficient evidence that the

PAGE

members of the *Russian Church in America* have acted correctly in rejecting all demands of "loyalty" to the Soviet regime 62

C. The legislature is to be presumed to have found upon sufficient evidence that there would be a diversion from the original trust purposes if it were held that only those worshippers who accepted the administrative control of the patriarchate were entitled to enjoy the properties which were dedicated to the use of the diocese prior to April 2-4, 1924 71

D. Even if it is considered that the terms of the original trusts cannot be carried out, the state has power, in the exercise of the *cy près* prerogative, to decree that the properties dedicated to the use of the diocese prior to April 2-4, 1924, may be enjoyed by the original beneficiaries subject to administrative control by the *Russian Church in America* instead of by the patriarchate 74

E. The determination of the legislature that the governing authorities of the *Russian Church in America* are the trustees who may be relied upon to carry out more effectively and faithfully the purposes of the religious trusts created for the benefit of the diocese prior to April 2-4, 1924, is supported by sufficient evidence and is reasonable 75

F. If the administrative control by the patriarchate of the properties dedicated to the use of the old diocese is based on rules having the force of contract, as pleaded in the amended answer, the contract has been rendered impossible of performance on the part of the Church located in Russia because the polity of that part of the Church, by force of the civil law, has become congregational 84

PAGE

POINT II. Neither the granting of a charter to a religious corporation nor the regulation, within reasonable limits, by the state of the conditions upon which the corporate property is to be held and administered, violates the principle of the separation of Church and State 86

A. A state may validly grant a charter to a religious corporation 86

B. In granting the corporate franchise to a religious society a state may validly provide for or against denominational control 90

C. The modification of the rule of denominational control effected by the enactment of Article 5-C was reasonable under the circumstances 91

D. Even if it is held that the rule of denominational control is imbedded in the federal constitution a state may validly inquire into and pass on the competence under their own rules of the denominational organs attempting to exercise such control 91

E. By laying down a rule in advance for the guidance of its citizens the legislature promoted public peace and order and discouraged litigation 94

POINT III. Religious liberty is promoted, not abridged, by the legislation 96

POINT IV. The religious freedom of Metropolitan Benjamin is not affected by Article 5-C as construed and applied by the Court of Appeals 99

POINT V. The Act does not "outlaw" or "suppress" the patriarchate in the state 100

POINT VI. The Act does not compel a "transfer" of the Cathedral from one jurisdiction to another 101

PAGE

POINT VII. None of the other alleged errors assigned by appellants merits serious consideration 106

A. The statute effects no transfer of property 106

B. No federal question is presented by the fact that the action was commenced one day before the statute became effective 107

C. The remarks of the Court of Appeals as to what would have been the disposition of the case in the absence of the statute have not the finality required for review in this Court 109

D. The use by the Court of Appeals of the record in *Kedrovsky* v. *Rojdesvensky* was not material 109

E. The defense of limitations was ruled on below 110

Conclusion 110

APPENDIX A List of Dates 111

APPENDIX B Religious Corporations Law, Article 5-C, §§105, 107 115

APPENDIX C Translations of Extracts from Articles Published in *Journal of the Moscow Patriarchate* 118

TABLE OF CASES.

	PAGE
Aktieselskabet etc. v. *W. A. Kirk & Co.*, 180 Misc. 979	108
Baptist Church v. *Witherell*, 3 Paige 296	90
Bellfort v. *Tooker*, 29 Barb. 256, 21 N. Y. 267	90
Bird v. *Merkles*, 144 N. Y. 544	53
Boyles v. *Roberts*, 222 Mo. 613	94
Brown v. *Clark*, 102 Ind. 323	93
Burns Baking Co. v. *Bryan*, 264 U. S. 533	77
Canovaro v. *Brothers of Hermits of St. Augustine*, 326 Pa. 76	107
Carothers v. *Moseley*, 99 Misc. 671	94
County of Cass v. *Smith*, 95 U. S. 360	55
Duvall v. *Synod*, 222 Fed. 669	94
Fancy Prairie Cong. v. *King*, 245 Ill. 120	94
Ferraria v. *Vasconcellos*, 31 Ill. 1	106
First Presb. Ch. v. *Cumberland Presb. Ch.*, 34 Okla. 503	94
First Presb. Ch. v. *First Cumberland Presb. Ch.*, 245 Ill. 74	94
In re Free Church of St. Barnabas, 41 Berks. 215	75
Girard v. *Philadelphia*, 7 Wall. 1	107
Grupe v. *Rudisill*, 101 N. J. Eq. 145	92
Hanna v. *Melick*, 223 Mich. 100	2, 11
Harrison v. *Crosby*, 173 Ala. 81	94
Hayes v. *Manning*, 263 Mo. 1	94
Jennings v. *Scarborough*, 65 N. J. L. (27 Vroom) 401	92
Jordan v. *Richmond Home*, 106 Va. 710	86
Kedrovsky v. *Archbishop and Consistory*, 195 App. Div. 127	94
Kedrovsky v. *Archbishop and Consistory*, 214 App. Div. 483	94
Kedrovsky v. *Archbishop and Consistory*, 218 App. Div. 121	94

PAGE

Kedrovsky v. *Archbishop and Consistory, Appeal of Kryzanovsky*, 218 App. Div. 124 94
Kedrovsky v. *Archbishop and Consistory, Appeal of Gates, Receiver*, 220 App. Div. 750 94
Kedrovsky v. *Rojdesvensky*, 242 N. Y. 547 ..... 13, 15, 16, 17, 24-26, 29, 31, 32, 56, 58, 94, 100, 109
Kedrovsky v. *Rojdesvensky*, 72 N. Y. L. J. 1211 26
Kedrovsky v. *Russian Catholic Church*, 249 N. Y. 75 ..... 14, 35, 94
Kedrovsky v. *Russian Catholic Church*, 249 N. Y. 516 94
Krauczunas v. *Hoban*, 221 Pa. 213 93

Landrith v. *Hudgins*, 121 Tenn. 556 94
Levy v. *Levy*, 33 N. Y. 97 53
Will of Lott, 193 Wis. 409 75
Lumley v. *Gye*, 2 El. & Bl. 216 83

Mack & Kime, 129 Ga. 1 93
Miller v. *Gable*, 2 Denio 492 97
Missouri Coll. v. *Guthrie*, 263 Mo. 32 94
Morgan v. *Gabard*, 176 Ala. 568 94
Mormon Church v. *United States*, 136 U. S. 1 ..... 54, 74

Nemelovsky v. *Rykhloff*, 187 App. Div. 290 94
Nikulnikoff v. *Archbishop and Consistory*, 142 Misc. 894 94
Novickas v. *Kraczunas*, 240 Pa. 248 93

Pawlet v. *Clark*, 9 Cranch 292 107
People's Bank v. *St. Anthony's R. C. Church*, 109 N. Y. 512 56
Petty v. *Tooker*, 21 N. Y. 267 90
Pheasant Grove Cong. v. *Riley*, 248 Ill. 604 94
Permanent Committee v. *Pacific Synod*, 157 Cal. 105 93
Presbyterian Congregation v. *Johnson*, 1 W. & S. (Pa.) 9 98

Ramsey v. *Hicks*, 174 Ind. 428 93
Reformed Bethanien Church v. *Ochsner*, 72 So. Dak. 150 92
Reformed P. D. Church v. *Mott*, 7 Paige 77 53

PAGE

Robertson v. *Bullions*, 11 N. Y. 243 ..... 56, 90
Russian-Serbian Holy Trinity Orthodox Church v. *Kulik*, 202 Minn. 560 91

St. Joseph's Hospital v. *Bennett*, 281 N. Y. 115 53
Sanders v. *Baggerly*, 96 Ark. 117 94
Shepard v. *Barkley*, 247 U. S. 1 94
Sherman v. *Richmond Hose Co.*, 230 N. Y. 462 75
Sims v. *Greene*, 160 F. 2d 512 60
Sweatt v. *Painter*, 338 U. S. 865 4

Tabernacle Baptist Church v. *Fifth Avenue Baptists Church*, 60 App. Div. 327, aff'd 172 N. Y. 598 53
Terrett v. *Taylor*, 9 Cranch 43 87
Matter of Trustees of N. Y. Protestant Episcopal Public School, 31 N. Y. 574 53
Trustees of Pencader Presbyterian Church v. *Gibson*, 19 Del. Ch. Ap. 375 92
Trustees of Presbytery of New York v. *Westminster Presbyt. Church*, 222 N. Y. 305 31

Waipa v. *Kushwara*, 259 App. Div. 843 ..... 38, 94
Waipa v. *Kushwara*, N. Y. L. J. Jan. 6, 1940 38
Waipa v. *Kushwara*, 283 N. Y. 780 ..... 38, 94
Walker Memorial Baptist Church v. *Saunders*, 285 N. Y. 462 54
Wallace v. *Hughes*, 131 Ky. 445 93
Wallace v. *Trustees of General Assembly*, 201 Pa. 292 92
Watson v. *Jones*, 13 Wall. [U. S.] 679 ..... 31, 78, 79, 90, 91, 92, 93
Werlein v. *New Orleans*, 177 U. S. 390 106
Westminster Presbyterian Church v. *Presbytery*, 142 App. Div. 855 107
Westminster Presbyterian Church v. *Trustees of Presbytery of N. Y.*, 222 N. Y. 642 108
Williams Estate, 52 Pa. D. & C. 107 75

Youngs v. *Ransom*, 31 Barb. 48 57

Table of Statutes.*

	PAGE
Civil Practice Act (N. Y.), §24	74
Instruction RSFSR Peoples Commissariat for the Interior, October 1, 1929	34
Laws (N. Y.) of:	
1784, c. 18	88
1813, c. 60	88
1863, c. 45	88
1867, c. 265	88
1871, c. 12	89
1873, c. 633	88
1875, c. 97, §4	90
1922, c. 187	88
1925, c. 463	6
1945, c. 693	8
1948, c. 711	8
New York Const., Art. X, Sec. 1	91
Personal Property Law (N. Y.)	74
Real Property Law (N. Y.)	74
Religious Corporations Law of 1895	17, 89
Religious Corporations Law (N. Y.):	
§2	6
§5	90
§15 (3)	103
§43	88
§91	56, 89
§321	89
XV	103
Virginia Const., 1902, Art. 59	86
Code, 1950, tit. 5, art. 2	86
West Virginia, Const., 1872, Art. VI, Sec. 47	86
Code, 1949, §§3488 *et seq.*	86

* The references cited in the footnote on pp. 87-88 are not included.

TABLE OF TREATISES, WORKS OF REFERENCE AND PERIODICALS.

	PAGE
Anderson: People, Church and State in Modern Russia	13
Bolshakoff: Christian Church and Soviet State	11, 13
Casey: Religion in Russia	10
Census of Religious Bodies, 1926	
Cleveland News	3
Columbia Encyclopedia: Orthodox Eastern Church	10
Curtiss: Church and State in Russia	10
Emhardt: Religion in Soviet Russia	13
Encyclopedia Britannica, v. 10	10
Encyclopedia Britannica, v. 16	9, 11, 46, 70
Fedotoff: Russian Church Since the Revolution	10, 34
Fortescue: Orthodox Eastern Church	9
Fowler: Charitable Uses, Trusts and Donations	54
Gsovski: Legal Status of the Church in Soviet Russia, 8 Fordham L. Rev. 1	15, 34, 80, 84, 107
Journal of the Federal Russian Orthodox Clubs	4
Journal of the Moscow Patriarchate	109
Macedonian Tribune	3
McCullagh: Bolshevik Persecution of Christianity	13
Milliukov: Outlines of Russian Culture, Part I	13
Miller: Peasant Pioneers	68
New Schaff-Herzog Encyclopedia of Religious Knowledge, v. 4	9
New York Times	3, 80, 81
Report of Senate Judiciary Committee, 81st Cong.	68
Restatement of Trusts	53
Scott on Trusts, v. 3,	53
Spinka: Church and Russian Revolution	10, 13

PAGE

Stokes: Church and State in the United States, v. I 96, 97
Stokes: Church and State in the United States, v. III 66

Timasheff: Religion in Soviet Russia 10, 30, 72, 80
Trinity Church Pamphlets 88

U.S.S.R. A Concise Handbook 70

Wall Street Journal 81
Wigmore: Evidence, 3 ed., v. 9 83

Zollman: American Church Law, 1933 54, 94, 98

Supreme Court of the United States

October Term, 1951

No. 44

JOHN KEDROFF and BENJAMIN FEDCHENKOFF, as Archbishop, etc.,

Appellants,

v.

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR APPELLEE.

[Emphasis in quoted matter, unless otherwise indicated, has been supplied]

Introductory.

The importance to the national interest of the general principle involved on this appeal transcends the particular situation before the Court.

The rising tide of immigration from Eastern Europe and the Near East brought here increasingly large numbers of Christians of the Eastern Confession, as well as those spiritually subject to the Pope but using the Eastern rite, commonly known as uniates. Before the Bolshevik Revolution most of these people, including many of the uniates, put themselves under the Russian church adminis-

tration (see *Hanna* v. *Melick*, 1923, 223 Mich. 100, 105). This was natural, since the Russian mission or diocese in North America had continuously existed since 1793 (R. 7) and the Czarist government was a source of financial support (223 Mich. 105).

With the Bolshevik attack on religion, the picture here completely changed. The funds from Russia were cut off. The St. Petersburg synod was succeeded by the Moscow patriarchate, but that office was soon suppressed by the Bolsheviks in favor of a schismatic sect whose emissary attempted to seize control of all of the properties in the North American diocese (*infra*, pp. 14, 17). Litigation was prolific throughout the diocese. As a result various nationalist groups withdrew from the diocese and became connected either with national churches abroad e.g. Serbian, Romanian, Bulgarian, Albanian, or with ancient Eastern sees e.g. Greeks, Ukrainians and Carpatho-Russians with Constantinople, Syrians with Antioch, or set up independent organizations (Ukranian).

The Russian diocese, being cut off from its administrative centre in Russia, perforce became temporarily autonomous, as had been authorized by a decree of Patriarch Tikhon (*infra*, p. 14). For nine years there was no interference from Moscow with the autonomous body (which for convenience will be referred to as the *Russian Church in America*). Then appeared on the American scene a representative of the patriarchate (appellant Fedchenkoff) *demanding that the clergy here pledge loyalty to the Soviet regime* (*infra*, p. 35). When they refused, the patriarchate broke off spiritual ties with the autonomous body and set up its own diocese (*infra*, p. 37). *The policy of demanding loyalty continues to the present day* (R. 125).

This means that criticism of the Soviet government is forbidden, even to the lay people (R. 228). The patriarchate itself, however, is voluble in publishing Soviet propaganda against the United States (Appendix C, *infra*, p. 118). Under these circumstances administrative connection between the *Russian Church in America* and the mother church is unacceptable to these freedom loving citizens of the United States and Canada.

The pattern of history is apparently being repeated in the case of other groups of Eastern Christians in America. The *Romanians* have broken off administrative ties with the patriarchate in Bucharest (Cleveland News, July 16, 1951). The *Bulgarian* parishes here have declared their independence of the Soviet dominated synod in Sofia (Macedonian Tribune, Indianapolis, Aug. 18, 1949). The *Albanian* parishes have declared their administrative independence of the autocephalous Church of Albania (statement of Bishop Fan S. Noli, Boston, Oct. 18, 1951). The *Syrian* parishes have protested to the Patriarch of Antioch against his alleged attacks, reported from Moscow, on the foreign policy of the United States (N. Y. Times, Aug. 26, 1951). The *Armenians* (theoretically an heretical sect but close in faith and worship to the orthodox East) are in open revolt against their Soviet controlled catholicos (N. Y. Times, November 26, 1951).

The *Greeks*, on the other hand, being subject to that distinguished churchman and former United States citizen, Athenagoras, Archbishop of Constantinople and Ecumenical Patriarch, are at present immune from Soviet interference, as also are the *Serbs* for obvious reasons.

The time is ripe for bringing together into one administrative organization all American Christians of the East

who refuse to be controlled by the Kremlin. The project has the blessing of the Ecumenical Patriarch*. The young people are especially enthusiastic for the idea of an American church, using English in its worship, and sufficiently strong, in numbers** and material resources, to take its place with the great denominations in this country*** (Proceedings of annual conventions of Federated Russian Orthodox Clubs as reported in the Russian Orthodox Journal).

An American Church of the Eastern Confession, safe from Soviet interference and secure in its temporalities, would not only contribute a great heritage to the religious culture of America—in spirituality, faith, dogma, worship, liturgy and general ethos—but would be a beacon to the multitudes of Eastern Christians now under the Soviet yoke. The Voice of America and Radio Free Europe could proudly inform the oppressed populations that in America there exists an autocephalous branch of their own confession free from all governmental control, at home or from

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* This statement is based on personal knowledge derived from official conferences in which the writer has participated.

** Eastern church statistics are misleading since only heads of families are registered as members and many worshippers attend only once or twice a year and do not become dues-paying members. It is the writer's belief that an American Church of the Eastern Confession, as envisaged in the text, would have a total attendance, at least on solemn holy days, of about 1,500,000 persons.

*** The American Church of the Eastern Confession envisaged in the text would naturally become a member of the National Council of Churches of Christ in the United States, of which four Eastern churches, including the *Russian Church in America*, are now members and a fifth, the Greek, is expected to become a member at the next meeting of the General Assembly in December, 1952. The first four were members of the Federal Council of Churches of Christ in America. (See footnote on pp. 1-2 of brief of Federal Council as *amicus* in support of petition granted in *Sweatt* v. *Painter*, 338 U. S. 865.)

abroad, and at liberty to criticize any government including its own. Such a bond of sympathy between the Christian populations behind the Iron Curtain and their fellow believers here would, it is submitted, be the equivalent of many billions of dollars in military preparedness.

But these hopes would be dashed if it were held that the hierarchs of the mother churches—although known to be mouthpieces of the Kremlin, openly agitating against the United States, yet exacting loyalty to their Soviet masters from the American clergy and laity—were forever to be in control of the temporalities here, because of a supposed constitutional restraint based on the American tradition of religious liberty and the principle of separation of church and state! The great body of the faithful would not tolerate an attachment so colored with political propaganda and oppression. They would prefer to forsake their accustomed places of worship, if to enjoy them cost so high a price. They would be tempted to lose all church affiliation.

This would be a national misfortune.

It may well be that the outcome hangs on the decision of the present appeal.

Opinions Below.

The opinions in the Court of Appeals are reported at 302 N. Y. 1. The opinions in the Appellate Division are reported at 276 App. Div. 309. The opinion at Trial Term is reported at 192 Misc. 327.

Jurisdiction.

The jurisdiction of this Court was invoked by appellants under 28 U. S. C. §1257 and also, in the case of certain non-appealable issues, under §2103.

Statement.

[For the convenience of the Court a chronological table has been prepared and appears as Appendix A, *infra*, p. 111]

The judgment appealed from directs judgment for the plaintiff (appellee here) in an action in ejectment relating to certain real property located at 13-15 East 97th Street, New York City (which will be referred to as the Cathedral). The action was commenced on April 9, 1945.

Parties.

Appellee is a New York religious corporation,* incorporated by special act (Pl. Ex. 1: L. 1925, c. 463, printed R. 169, offered R. 6) for the purpose of

> "acquiring, maintaining and management of a cathedral church and its appurtenances in the city of New York as a central place of worship of the Russian Orthodox Church in North America, in accordance with the doctrine, discipline and worship of the Holy Apostolic Catholic Church of Eastern Confession as taught by the holy scriptures, holy tradition, seven oecumenical councils and holy fathers of that church; together with the residence of the ruling archbishop of the Russian Orthodox Church in North America, and such incidental cathedral foundations, schools, faculties and other religious, charitable and educa-

* "A 'religious corporation' is a corporation created for religious purposes" (Religious Corporations Law §2).

tional work as may be properly connected therewith in and for the said Russian Orthodox Church in North America" (R. 169-170).

Appellee has had title to the Cathedral since April 17, 1925 (R. 204).

Appellant *John Kedroff* was occupying the Cathedral when the action was brought in 1945 against him as sole defendant. He was the surviving son of John Kedrovsky, agent of the schismatic Renovated sect, who in 1926 had ousted the lawful occupants of the Cathedral, licensees of appellee, by means of what is now recognized to have been a miscarriage of justice (R. 261-262). Appellant Kedroff, when sued by appellee, associated himself with the representatives of the Moscow patriarchate and admitted them to the premises (R. 138).

Appellant *Fedchenkoff (Metropolitan Benjamin)* occupied the Cathedral *for the first time* in 1945, when he was admitted by appellant Kedroff (R. 137-138). He did not intervene in this action until 1947.

Issues Raised by Pleadings.

Only the issues raised by the first and third affirmative defenses contained in Metropolitan Benjamin's amended answer (R. 2) are material on this appeal.

The first defense alleges in substance that Metropolitan Benjamin is entitled to possess the Cathedral by virtue of his appointment as archbishop of the diocese of North America and the Aleutian Islands of the Russian Orthodox Church, under the rules of said church; also that the Cathedral is held in trust for the accredited archbishop.

The third affirmative defense sets up the bar of limitations.

Statute Involved.

The statute upon which the decision appealed from is based is Article 5-C of the Religious Corporations Law of New York (L. 1945, c. 693, effective April 10, 1945). Shortly after the coming down of the decision at Trial Term holding that Article 5-C did not apply to appellee (192 Misc. 327), the legislature passed a bill amending Article 5-C (L. 1948, c. 711). As stated by Judge Conway the amendments "illustrate beyond cavil that the decision of that court [Trial Term]* did not correspond with the intent of the Legislature, which immediately interpreted and explained its prior enactment" (R. 278).

The material portions of Article 5-C, as amended, are given in Appendix B (*infra*, p. 115).

The decision below holds in effect that appellee** is a *Russian Orthodox church*, as that term is defined in §105 of Article 5-C, and that §107 requires its property to be administered subject to the governing bodies, and in accordance with the rules, of the *Russian Church in America* (R. 277).

Factual Background of Legislation.

In upholding the validity of Article 5-C, as applied to appellee, the Court of Appeals detailed "the circumstances which forced the North American church [*Russian Church in America*] to declare its temporary autonomy, and the process by which the Moscow Patriarchy has been subjugated by the Russian Government and used as its tool"

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* Judge Conway inadvertently referred to the trial court as Special Term.

** Actually, Judge Conway referred to the Cathedral, *i.e.* the property, as a "Russian Orthodox church" but the context shows that the mandate of §107 is directed to *corporations* and only through them to their *properties*.

(R. 281). The court held that these "facts must be deemed to have been found by and to have been within the actual knowledge of the Legislature when it decided to act in 1945 and 1948" (R. 281).

While Judge Conway's opinion contains a graphic recital of the facts, it may be helpful to the Court if a somewhat different treatment of the same subject is given here.

Eastern Confession.

The Holy Orthodox Catholic Apostolic Eastern Church (4 New Schaff-Herzog Encyc. of Religious Knowledge, 48), sometimes called the Eastern Confession or Greek or Orthodox Church, comprises a group of religious bodies, substantially* identical in faith, dogma, orders, liturgy and ritual, derived from Holy Scripture, the writings of the early fathers, the canons of the ecumenical councils and the practice of the early undivided Church (Fortescue: Orthodox Eastern Church, passim). In the spiritual sphere the highest authority in the Church is the decree of a council which meets sufficiently wide acceptance to be deemed ecumenical (16 Encyc. Brittan., 1951, p. 939). On the administrative plane, however, each of the branches is autocephalous i. e. administered by its own governing organ. An *autocephalous* branch may comprise an *autonomous* subbranch which governs itself but recognizes the head of the main branch as its own head, even if only in an extremely limited, almost exclusively symbolical, sense (R. 246).

Except for the Churches of Antioch, Alexandria, Jerusalem and Constantinople, dating back to the foundation of these ancient sees, and such minor bodies as the Churches of Mt. Sinai and Cyprus, *all of the existing branches came*

* The differences are less significant than those tolerated within a single branch of the Anglican communion.

into existence as the result of political conditions (Columbia Encyc., 1946, tit. Orthodox Eastern Church, p. 1314).

Church of Russia.

Converted to Christianity in 987, the Russians were for several centuries part of the Church of Constantinople, ruled by the Ecumenical Patriarch. Upon the loss of prestige by that patriarchate, arising from the fall of Constantinople to the Turks in 1453, the Russians ignored the right of the Ecumenical Patriarch to appoint their metropolitan and did not seek confirmation of the candidate chosen by their bishops (Casey: Religion in Russia, p. 7). The *de facto* autocephaly thus assumed by unilateral action was not made *de jure* until 1589 when the first Patriarch of Moscow and All Russia was recognized by the Ecumenical Patriarch (ibid. p. 9).

From about 1700 to 1917 the Russian Church was governed by the Most Sacred Governing Synod (Curtiss: Church and State in Russia, *passim*). Under the Kerensky regime, after many years of preparation under the Czar (Spinka: Church and Russian Revolution, Chap. II), a Great Sobor (convention) of the Russian Church was held in Moscow, which sought to democratize the administrative structure of the Church to some extent (Fedotoff: Russian Church Since Revolution, p. 14). The supreme authority was vested in the sobor, which was to be convoked at established intervals and be composed of bishops, other clergy and laymen (R. 18). The patriarchate was re-established and the patriarch placed at the head of the administration, in charge of the internal and external welfare of the Church. His name (instead of the Synod's) was to be proclaimed at divine services (R. 19).

The enactments of the first Great Sobor* also provided for the participation of other clergy and laymen with the bishop in the government of a diocese (R. 19). The diocesan convention (sobor) was defined as "a superior body with the assistance of which the diocesan bishop rules the diocese" (R. 20-21).

North American Mission or Diocese Before 1924.

At the Great Sobor of 1917-1918 Tikhon was chosen as patriarch. He had been ruling bishop of the North American diocese at an earlier period (R. 16).

Beginning with missionary activity in Alaska in 1793, the Russian Church has had a continuous existence on the North American continent. The seat of the ruling bishop was moved from Sitka to San Francisco in 1870 (R. 11) and to New York City in 1905 (R. 8).

In 1916 there were 343 parishes under the jurisdiction of the Russian archbishop, but this number decreased with the withdrawal of various nationalist groups after the Bolshevik Revolution (16 Encyc. Brittan., 1951, p. 941 C-D; see *Hanna* v. *Melick*, 223 Mich. 100).

Suppression of Patriarchate by Bolsheviks: Schism of the Renovated.

Patriarch Tikhon soon came into conflict with the atheist masters of Russia who never hid their desire to exterminate religion as an opiate of the people and confiscated the whole Church property. Thousands of priests were executed, not only on pretext of political crimes but simply in revolutionary passion (R. 46-47).

* "[The Sobor] succeeded in giving the Russian Church a new and canonical constitution. The Sobor restored the Patriarchate, abolished by Peter the Great in 1721, affirmed the conciliar basis of the Russian Church and organized a rather democratic diocesan and parochial administration." Bolshakoff: Christian Church and Soviet State, p. 33.

Five years after the Revolution the Bolsheviks invented a new measure in the struggle with the Church, namely, the schism (R. 47). The government confiscated the church valuables; the people resisted; there were many arrests, trials and capital punishment; the Patriarch was imprisoned (R. 47-50).

This moment was used by a group of revolutionary priests for a coup within the Church; the government permitted them to talk with the Patriarch; he issued a letter authorizing them to deliver the central office files to a *locum tenens;* instead of doing so, they declared themselves the High Church Administration (R. 50). They tried to introduce uncanonical innovations, such as a married episcopacy (R. 51). In 1923, without authority from the Patriarch, they convened a sobor which purported to depose and unfrock the Patriarch, without a trial, abolish his office and establish a "Holy Synod" in supreme control of church affairs (R. 51-56). This was the origin of the Renovated Church, sometimes called the Living Church, the New Church or the Synodal Church (R. 41). Its members were mainly moved by terror and fear, the desire to escape the general persecution (R. 47). "There is evidence that they [the Renovators] were aided and abetted in their plan by the Russian Government which permitted them to proceed while killing, arresting or exiling those members of the church who objected" (R. 256-257).

At their 1923 sobor, the Renovators announced:

> "• • • All-Russian Local Sobor of the Orthodox Church testifies before the face of the Church and all mankind that at present the world has divided itself into two classes: capitalists-exploiters and proletariat, with whose labor and blood the capitalist world is building its welfare.

> In the whole [world] only the Soviet Government of Russia went into battle with that social evil. The Christians cannot be indifferent spectators of that battle. **The Sobor declares capitalism to be a mortal sin, and a battle with capitalism to be holy to Christians.** In Soviet Authorities the Sobor sees a world's leader for fraternity, equality and peace of nations. The Sobor stigmatizes the international and national counter-revolution and condemns it with all its religious and moral authority" (Pl. Ex. 6A, not printed: see record on appeal* in *Kedrovsky* v. *Rojdesvĕnsky*, 242 N. Y. 547, at fol. 1526).

The parties to this cause are in agreement that the Renovated Church was uncanonical (R. 163-164). It is extinct today (R. 164).**

Patriarch Tikhon was released from prison in June, 1923 (Timasheff, op. cit., p. 33),*** but confined in a monastery (R. 57). He branded the acts of the Renovators as invalid (R. 56). He died on March 8, 1925 (R. 57), having named as patriarchal *locum tenens* in order of succession three bishops, each of whom was arrested (R. 57). From 1922 to 1927 the central office of the Patriarchal (sometimes called Old or Tikhonite as distinguished from the Renovated) Church was suppressed by the government (R. 80; cf. Timasheff, op. cit., pp. 31-34).

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* Copies of this record will be furnished to the Court.

** For a more detailed account of the Renovated Schism than appears in the record, see McCullagh: Bolshevik Persecution of Christianity; Spinka: Church and Russian Revolution; Emhardt: Religion in Soviet Russia; Miliukov: Outline of Russian Culture, Part I; Timasheff: Religion in Soviet Russia; Anderson: People, Church and State in Modern Russia.

*** He had "signed on June 16, 1923, a most humiliating document, in which he not only repealed his former anathematizing of the Soviet but recognized himself guilty before it and requested his freedom, with repentance and promise of future loyalty." Bolshakoff, *op. cit.*, p. 37.

Patriarchal Ukase No. 362.

Two years before Tikhon's arrest the supreme church administration (patriarch, holy synod and supreme church council [R. 18]), had issued an ukase (decree) which provided, among other things, that in case the activity of the supreme church administration should stop and it was impossible for a diocesan bishop to establish contact with the bishops of the neighboring dioceses, he should himself assume full power and organize the diocesan administration with the assistance of the existing offices (convention, council, etc.) or newly organized ones; in case the situation should acquire a protracted or permanent character, the diocese should be divided into small dioceses and form itself into a district; all measures taken locally in accordance with the present instructions and all measures taken thereafter must be submitted for confirmation later to the central church authority when re-established (Pl. Ex. 5A: ukase No. 362, November 7-20, 1920, pr. R. 177, off. R. 44).

Titles to American Church Properties Jeopardized by John Kedrovsky.

In 1918 one John Kedrovsky commenced an action in the Supreme Court of New York on behalf of himself and other priests of the North American diocese against a corporation known as the Archbishop and Consistory which was a managing and advisory group handling the affairs of the diocese. He alleged that the lawful archbishop, Evdokim (Meschersky), had departed from the United States and that one Alexander (Nemolovsky) was usurping the office. He obtained the appointment of a receiver to whom the deeds of 135 church properties, standing in the name of Alexander, were delivered (see record on appeal in *Kedrovsky* v. *Russian Catholic Church*, 1928, 249 N. Y. 75, a copy of which will be furnished to the Court).

Appointment of Platon as Ruling Bishop.

Archbishop Platon (Rojdesvensky), who had ruled the diocese from 1907 to 1914, returned to this country in 1921. Prominent churchmen of the diocese urgently petitioned Patriarch Tikhon to reappoint him formally as ruling archbishop. In 1922 he received an oral, and in 1923 a written, appointment from Patriarch Tikhon.*

Purported Dismissal of Platon by both Patriarchal and Renovated Authorities.

Platon was openly critical of the Soviet regime (R. 223, 115, 116, 118, 122). In Bolshevik terminology this made him guilty of "acts of counter-revolution" (R. 57-58; see also Gsovski: Legal Status of the Church in Soviet Russia, 8 Fordham L. Rev. 1, 25-29), a situation which was embarrassing for both the schismatic and the canonical hierarchs in Moscow.

In 1923 the "Holy Synod" of the Renovated Church purported to excommunicate Platon (Pl. Ex. 18: extract from proceedings of Renovated synod, off. R. 155, not printed, see record in *Kedrovsky* v. *Rojdesvensky*, fols. 1668-1672) and to appoint in his place, as ruler of the diocese, the priest who had already succeeded in tying up in litigation titles to 135 of the church properties (*supra*, p. 14), John Kedrovsky. Although he was a married man, the Renovators went through the form of consecrating him a bishop and equipped him with impressive credentials as their representative in America and the ruler of the diocese (Pl. Ex. 18A: certificate of appointment and consecration,

* These circumstances are detailed in Judge Conway's opinion (R. 257-258) which is based partly on the record in *Kedrovsky* v. *Rojdesvensky*. Appellants' objections to the use of the earlier record are dealt with in the Argument (*infra*, p. 109).

off. R. 155, not printed, see record in *Kedrovsky v. Rojdestvensky*, fols. 1673-1674).

Not to be outdone by his Renovated rivals in stamping out the heresy of "counter-revolution", Patriarch Tikhon with his Holy Synod issued a decree dated January 16, 1924, reading as follows (R. 223-224):

> "As We have data proving that the Metropolitan of North America [Platon] has engaged in **public acts of Counter-Revolution directed against the Soviet power** and of disastrous consequences to the Orthodox Church,—Metropolitan Platon will be dismissed from the government of the North American Diocese from the day on which this Present Decision is announced to him. (2) The choice of a candidate for the North American Episcopal See will be the object of a special discussion. It will be his duty personally to announce this Decision to Metropolitan Platon and to take over from him all the Church property, governing the North American Diocese according to the special instruction which will be given him. (3) Metropolitan Platon will be invited to come to Moscow to put himself at the disposal of the Patriarch."

At the date of this decree Tikhon was confined in a monastery, seriously sick, with four doctors in attendance upon him and suffering heart attacks (R. 181).

The text of the decree, which by its terms was not to become effective until announcement to Platon by his successor personally (R. 223, 180), was published in the newspapers here shortly after its date (R. 180), although not until nine years later, in 1933, did it become operative by delivery to Platon (R. 113, 224).

Founding of Saint Nicholas: First a Parish Church, then a Cathedral.

In 1893 a parish started in New York "as brotherhood and a small group, asking to build a church and have regular services" (R. 8). They collected money, both here (R. 8, 13) and abroad. The Church in Russia and the Russian government contributed substantial sums (R. 13, 164). The priest in charge of the parish was named Hotovitsky (R. 13). In 1899 the Russian ambassador and consul general incorporated the parish under the Religious Corporations Law of 1895 with the name Russian Orthodox St. Nicholas' Church in New York (R. 232) For convenience the corporation will be referred to as St. Nicholas' Corporation.

In 1899 St. Nicholas' Corporation acquired the land, (R. 71) and in 1903 erected the buildings, which are the premises in suit. *They were acquired, built and consecrated as a parish church* (R. 8).* Later, the property (R. 8, 12) became the diocesan see (R. 8) and was called a cathedral, although the name of the corporation was not changed. The Cathedral was occupied by the ruling archbishops from 1905 to 1926 (R. 17, 23-24).

Platon Sued by Representative of Renovated Church.

On March 29, 1924, John Kedrovsky, alleging that he had been appointed archbishop of the diocese and that Platon had been suspended, brought suit in the state court of New York to restrain Platon and another (the dean) from occupying the Cathedral. This was the commencement of the suit of *Kedrovsky* v. *Rojdesvensky*, which was to have the extraordinary denouement below recounted

* "They started in 1903, and the church was consecrated in 1905, and was a parish church at that time" (R. 8).

(*infra*, p. 29). Litigation with the Renovated Church over other church properties also ensued (R. 181, 193).

***Russian Church in America* Created at Detroit Sobor of 1924.**

On April 2-4, 1924, a diocesan convention (sobor) was held at Detroit (Pl. Ex. 6: extracts from minutes, pr. R. 180, off. R. 44).

A report on behalf of the diocesan council was made by the dean of the Cathedral, Leonid Turkevich (now Metropolitan Leon~~ty~~). He related how Metropolitan Platon had been elected at a sobor held at Pittsburgh in 1922 and confirmed as head of the diocese by Patriarch Tikhon in 1923. He also referred to the decree of Patriarch Tikhon dismissing Metropolitan Platon which had been published in the local papers but suggested that this decree had been extracted from the Patriarch during a severe illness. He also referred to a statement of Evdokim Meschersky of the Renovated Church* which had been published in the press in regard to Metropolitan Platon. He said:

> "We all must know that we are threatened with the danger of losing Metropolitan Platon. In the meantime it is only he who can save our diocese. The merits of His Eminence the Metropolitan before the Russian American Church are recognized not only by our Mother Church of Russia but also by other denominations here in America.
>
> And so we have two documents before us concerning our American Church: one, a decree of the legal Church Authority, undoubtedly forced by the Soviet power, of Patriarch Tikhon regarding the recall of his Eminence the Metropolitan to Moscow, and the

* The same Evdokim who had been ruler of the diocese and left in 1917.

other, from the Moscow Synod of the 'Living Church', concerning the appointment as administrator of the Russian American Church of Mr. J. Kedrovsky calling himself Metropolitan.

In view of the fact that we are threatened with great danger in the American courts at the present time, and particularly if America should recognize the Soviet Government, the Metropolitan desires to hear the voice of his diocese; he wants to know how we look upon the future of our Orthodox Church here in America, and upon the threatening danger of losing our church properties, and upon the throwing of the yoke of Bolshevism on the future generation" (R. 180-181).

Another delegate, Mr. Greaves, who was later to attend to the legal affairs of appellee (R. 6, misprinted "Graves") said:

"* * * lately there have been outside lawsuits with the 'Living Church', which aspires, first, to seize the power over our Church in America and, secondly, to take our Church properties.

In such a situation it would be a great mistake to think that we can or must submit to the trend of circumstances, let our Metropolitan go and await a new bishop.

We have just heard the narration of the Very Rev. Leonid Turkevich as to how a bishop is being appointed here and how Metropolitan Platon is being recalled. If it is established beyond doubt that violence is being used on Patriarch Tikhon, that he is being forced to issue over his signature such acts as he could not issue under conditions of actual freedom, then we are not insured against all kinds of surprises, which could basically undermine that church order and peace which have with such great labor already been practically arranged by His Eminence the Metropolitan in the Church here, and would involve our Church here in a condition of that same anarchy

under the banner of which church life in Russia exists at present. This is why it is necessary, finally, to organize our church life here in America so that nothing from outside would threaten it. We must create our own firm Church Administration, completely insured against the possibility of the direct or indirect influence of the Soviet power" (R. 181-182).

* * * * * *

"There is only one way out of the situation that has arisen: we must exist independently. In the future no one can and must not either appoint or recall bishops, without the will to do so on the part of the Sobor of the American Orthodox Church. We ourselves establish church authority for ourselves" (R. 183).

The sobor was also addressed by Very Rev. Chepeleff, who characterized the Renovated Church as an heretical sect and suggested that Patriarch Tikhon was tolerated by the Soviet power only as a means of influencing opinion at home and abroad. He said.

"The Holy Sobor can judge itself how near to normal are those conditions of governmental existence under which the Patriarch has to realize his right of administration of the Russian Church.

In Russia at the present time there is no freedom of religion, more than that—at the present time in Russia there exists the most cruel and merciless persecution of any religion and of its representatives, while they have entirely enslaved the Orthodox Church and made her a servant of their political interests.

* * * I have in view that disquieting question which every one of us puts to himself: what would be the Most Holy Patriarch Tikhon's attitude if our American Church, in view of all that is now happening in Russia, should begin to live by herself,

pending the establishment of order in the life of the Russian Church" (184-185).

He then referred to the decree* of Patriarch Tikhon authorizing temporary local church administrations to be organized in case of a diocese being cut off from communication with the central church administration (*supra*, p. 14) and went on to say:

> "In this document what is substantially of importance to our Church in America is that we, actually, for a good many years now, as Mr. Greaves rightly said here, have been cut off from the highest organ of the administration of the Russian Church which is Patriarch Tikhon" (R. 185).

According to the minutes the "debate which followed showed the unanimous desire of the members of the Sobor to keep our American Church from Soviet interference" (R. 186).

> " 'There is no doubt,' said the Very Rev. Klopotovsky, 'that we all stand for the Patriarch. But, do you know that he would be thankful to us if we separated from him. By such an act we would relieve his heavy cross. Do not forget that soon we will have to pay the Receiver 5% of our church income. We will not be allowed to drive a nail into the wall of any of our churches without the permission of the Receiver. It has been said that the Patriarch is going to send us a bishop from Russia. We should know that no bishop will be permitted to leave Russia for abroad except a 'Living Church' one. Look at the example of the Japanese Church; it is long since autocephalous' " (R. 186).

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* The minutes report the speaker as using the date 1921 (R. 185) instead of 1920.

It was submitted to the Sobor that resolutions should be worked out disposing of the two basic problems facing "our church":

> "(1) To leave Metropolitan Platon as the head of our Church here,
>
> (2) To recognize ourselves as a self-governing Church" (R. 187).

At a later session a resolution was adopted:

> "To recognize that His Eminence Metropolitan Platon may be removed from the Diocese only in a legal manner and not otherwise than with the agreement of the flock that elected him" (R. 187).

The following resolutions were then adopted (R. 187-189):

> "POINT 1. Temporarily, until the convocation of the All Russian Sobor further indicated in Point 5, to declare the Russian Orthodox Diocese in America a self-governed Church so that it be governed by its own elected Archbishop by means of a Sobor of Bishops, a Council composed of those elected from the clergy and laity, and periodic Sobors of the entire American Church."
>
> "POINT 2. To ask filially the Most Reverend Metropolitan Platon to head the administration of the Church and to rule it first with the cooperation of the existing Council of Bishops and Diocesan Council and to elaborate in speedy order a plan for the permanent administration of the American Church for the future, which, in agreement with the foundations of Orthodoxy, must be organized upon the basis of elected Sobors.
>
> "NOTE: The term 'in speedy order' must be understood in the sense of a definite period of six months."

"Point 3. To filially ask the Most Reverend Metropolitan Platon together with all the bishops to approve this resolution and to inform all the Eastern Churches of the reorganization which has taken place."

"Point 4. **Not to break at all the spiritual ties and communion with the Russian Church,** but always to pray for her good, give her every cooperation and mention the Most Holy Patriarch as the head of the Russian Mother Church to which the American Church is obligated for her existence."

"Point 5. To leave the final regulation of questions arising from the relationship of the Russian and the American Churches to a future Sobor of the Russian Orthodox Church which will be legally convoked, legally elected, will sit with the participation of representatives of the American Church under conditions of political freedom, guaranteeing the fullness and authority of its decisions for the entire Church, and will be recognized by the entire Oecumenical Orthodox Church as a true Sobor of the Russian Orthodox Church.

"Point 6. For participation in the working out of a new constitution of the American Church, as well as for the elaboration and execution together with the Bishops of all acts and measures as shall be needed in the development of the reorganization of the American Church, to elect six delegates from the Sobor, of which 3 from the clergy and 3 from the laity, to whom shall be turned over all the questions indicated in the name of this Sobor, being guided by the resolutions of the All-Russian Church Sobor of 1917 and 1918.

"Point 7. To consider the present resolution effective until there shall take place an All-Russian Church Sobor, under the conditions indicated above in Point 5, guaranteeing its freedom and legality,

and at that Sobor final agreement shall be reached as to the fate of the American Church."

Although this action was taken in 1924, it appears that Platon did not publicly proclaim the administrative autonomy of the *Russian Church in America* until 1933 (R. 118, 242).

Cathedral Central See of *Russian Church in America*.

Just as the Cathedral had been the central see of the North American diocese so it was the central see of the *Russian Church in America* after the 1924 sobor. Metropolitan Platon and Dean Turkevich remained there (R. 64, 8-9).

Trial and Decision of *Kedrovsky* v. *Rojdesvensky* at Special Term.

The trial opened on October 27, 1924. Metropolitan Platon's counsel concentrated on attacking the canonicity of the Renovated Church and proving the oral and written appointments of Platon by Patriarch Tikhon. He made no attempt to base Platon's rights on the action of the Detroit sobor of 1924. In fact the resolutions of that sobor were excluded when first offered (Record in *Kedrovsky* v. *Rojdesvensky*, fols. 605-607) and later admitted only as bearing on "the sentiment of the diocese" (*ibid.*, fols. 1269-1270).

On December 24, 1924, Mr. Justice Ford ruled in favor of Platon. After quoting from the proceedings of the pseudo-sobor, he said:

> "* * * the Sobor's fulsome praise of the Soviet government and all that it had done and proposed to do and its unreserved pledge of loyalty to the dictatorship, remind one of a rabid, partisan, polit-

ical convention rather than of a supreme ecclesiastical care of eighty million souls.

• • • • • • •

There is a graver consideration in the attempt of this new church, a product of the Russian dictatorship, to obtain control of a country-wide religious organization in America with hundreds of clergymen and branches scattered all over nearly all the states and having upwards of a quarter of a million members. **The property used by the Russian Church totals in value an immense sum. If the Soviet authorities can gain control of all these, what a base for their revolutionary propaganda they will have secured.**

Reference to the 'Bulletin' of the proceedings of the Sobor of 1923 clearly shows its community of purpose with the Soviet dictatorship in the work of instigating revolution and destroying this and all other governments to make way for a universal 'dictatorship of the proletariat.' • • •

Much more might be quoted to show that this new church makes it obligatory upon all its members under pain of mortal sin to make the purposes of the Russian dictatorship their own. Those purposes are well known—no less than the subversion of this and all other governments on earth by bloody revolution. **To that end is its world wide propaganda maintained—all the more dangerous when insidiously carried on in the guise of religious doctrine by agents garbed in the reverential vestments of a great church.**

• • • the judiciary, oath bound to support the constitution, should not be behind the other departments of government in curbing the activities and the power for harm of the enemies of our democracy whenever, wherever or however they appear. Self preservation is the supreme law of governments as well as of individuals. Herr Most was twice con-

victed, once for an incendiary speech and again for inciting to violence through the printed page. He would not have been heard to urge in defense of his preachments that he was merely expounding his religious faith. Neither should these ecclesiastical propagandists of armed revolution be protected by similar pretenses. The criminal courts take cognizance of such offenses against orderly government, but the civil courts too should, I believe, wield their power to protect the state from the menace of insurrectionary propaganda on the high grounds of manifest public policy."

72 N. Y. L. J. 1211, Dec. 31, 1924; record in *Kedrovsky* v. *Rojdesvensky*, fols. 2005-2006, 2023-2024, 2034-2037.

Incorporation of Appellee and Transfer of Title to it by St. Nicholas' Corporation.

Shortly after the coming down of this opinion Metropolitan Platon and his advisers determined to apply to the New York legislature for a special act of incorporation for the Cathedral. In preparing the draft of the act Metropolitan Platon had the assistance of George Zabriskie, Esq., who also interested several Assemblymen and Senators in its passage (R. 171-172) and assisted in organizing the corporation.

The act (L. 1925, c. 463) became effective on April 8, 1925 (R. 169, 171).

The act named as incorporators Metropolitan Platon and nine other persons, including Valerian E. Greaves (R. 169), one of the active participants in the 1924 sobor (R. 181, 187). The act constituted the corporators as the first trustees and empowered the corporation to adopt a constitution (R. 170).

The objects and purposes of the corporation, as stated in the act, have already been given (*supra*, p. 6).

The act required that the ruling archbishop of the "Russian Orthodox Church in North America" exercising jurisdiction as such, for the time being, should always be ex-officio a member and trustee and the official head and presiding officer of the corporation (R. 170).

By §6 of the act St. Nicholas' Corporation was authorized "by its trustees or trustee for a nominal or other consideration to sell, convey, assign and transfer" to appellee any or all of the real and personal estate of St. Nicholas' Corporation.

On April 17, 1925, St. Nicholas' Corporation transferred the Cathedral, with all of the personal property of that corporation which was in the Cathedral, to appellee (Pl. Ex. 11: deed, pr. R. 204, off. R. 73).

On April 23, 1925, the incorporators and first trustees of appellee held a meeting on the Cathedral premises (Pl. Ex. 3: minutes, pr. R. 171). Metropolitan Platon presided and expressed his satisfaction that by the incorporation the Cathedral "will forever be preserved safe as a central place of worship of the whole Russian Orthodox Church in North America and seat of the Church Administration in this country" (R. 171). The act of incorporation was read and a copy was ordered to be prefixed to the minutes (R. 171-172). The conveyance by St. Nicholas' Corporation to appellee was noted (R. 172). A constitution was adopted the preamble of which recited that in the exercise of the powers vested in the trustees by the special act

> "and in full realization of our sacred duty to protect the interests of the Russian Orthodox Church, to preserve her unity, and secure forever her welfare in the country, we, the Trustees * * * do hereby set forth and ordain the following Constitution providing, however, that nothing therein shall be construed

as a surrender by the Board of Trustees of any part of the final authority and responsibility solemnly imposed upon them by the Charter for maintenance and management of the Cathedral and its appurtenances in accordance with the doctrine, discipline, and worship of the Holy Apostolic Catholic Church of Eastern Nations, as taught by the Holy Scriptures, Holy Tradition, the Seven Oecumenical Councils and Holy Fathers of that Church."

A committee was appointed to draft statutes which it was determined should provide (R. 174)

"that the Ruling Archbishop of the Russian Orthodox Church in North America who at this time is His Eminence, Metropolitan Platon, duly appointed to this office by His Holiness, the late Patriarch Tikhon, shall have the right to nominate the dean and other clergy and servants of the Cathedral; and use the Cathedral at his discretion for all Episcopal acts and for other religious, benevolent and educational purposes, and have the general and unrestricted direction of the religious services in the Cathedral, and to use the building known as the rectory adjoining the Cathedral as his personal residence, and that it shall be lawful for the Archbishop through the Dean of the Cathedral or any other person to be designated by him, to organize a parish at the Cathedral consisting of the Communicants worshipping at the Cathedral Church • • •".

No change occurred in the use of the premises by reason of the transfer of title from St. Nicholas' Corporation to appellee. The Cathedral continued to be used as the central place of worship of the *Russian Church in America*, as the headquarters of that body and the residence of the Metropolitan (R. 64-65).

Argument and Decision of *Kedrovsky* v. *Rojdesvensky* on Appeal.

In the Appellate Division, as well as in the Court of Appeals, Metropolitan Platon's counsel relied on the resolutions of the Detroit sobor only as confirming the fact of his previous appointment by the Patriarch (Respondents' brief* in Appellate Division, p. 15; appellants' brief* in Court of Appeals, p. 19). No attempt was made to base Platon's authority on his election as head of the administratively autonomous *Russian Church in America.*** In fact his counsel construed the Detroit resolutions as aimed only at the Renovated Church (Respondents' brief in Appellate Division, p. 56; appellants' brief in Court of Appeals, p. 64).

On November 27, 1925, the Appellate Division handed down an opinion (*per* McAvoy, J., Clarke, P.J., Dowling and Merrell, JJ., concurring) which reversed the decision at Special Term (214 App. Div. 483). The majority were impressed by the deposition on behalf of Kedrovsky made by one Dr. Hartman, a Methodist minister (now bishop) who had attended the 1923 pseudo-sobor (R. 97) and swore that it was convened by the Patriarch (214 App. Div. at p. 488). The majority were also impressed by Kedrovsky's written credentials from the Renovated "Holy Synod" (Pl. Ex. 18, not printed; see *Kedrovsky* v. *Rojdesvensky* record, fols. 1668-1674).

On the other hand Platon had been in no position to prove his case by evidence from Russia. The Russian government was then favoring the Renovated Church (*cf.*

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* Copies of these briefs will be furnished to the Court.

** Appellants' statement (brief, p. 8, n. 3) that Platon's "claim on the ground of local election was rejected" is misleading. The election was referred to only as showing recognition of his appointment.

Timasheef, op. cit., p. 33); Platon was *persona non grata* (R. 115, 119).

Today, now that the Renovated Schism has become an historical fact and it is established that the pseudo-sobor of 1923 was not convened by the Patriarch and Holy Synod and was not canonically valid (R. 163-164), the truth is found to have been expressed by Mr. (later Presiding) Justice Martin in his dissenting opinion (214 App. Div. at p. 490):

> "* * * He [Kedrovsky] is the servant of a group who have reached a position of power in their church organization through the revolution in Russia and by what appear to be questionable means. It is extraordinary that they should have the aid of a court of equity to displace those who are administering the trust strictly as it was intended to be administered."

The majority, however, found, "contrary to what is now conceded to be the fact" (R. 262), that the sobor of 1923 was valid and that the Renovated Church had power to appoint Kedrovsky ruler of the diocese. Judge Conway explains what then happened in the Court of Appeals as follows (R. 262):

> "* * * When the appeal from that decision reached us we treated it as one involving only questions of fact as to whether (1) there was a governing body of the church and whether (2) that governing body had recognized Kedrovsky as archbishop of the church. We determined that there was evidence to sustain the findings of the Appellate Division on both those points. We thereupon affirmed the judgment, one Associate Judge being recorded as absent. (*Kedrovsky* v. *Rojdesvensky* [1926], 242 N. Y. 547.) The control of all phases of Russian life by the Government was not as apparent in 1924 as it is a quarter of a century later and on the surface, at least, the case

appeared to be a proper one for the application of the rule that in an ecclesiastical dispute involving a denominational church, the decision of the highest church judicatories will be accepted as final and conclusive by the civil courts (*Trustees of Presbytery of N. Y.* v. *Westminster Presbyt. Church*, 222 N. Y. 305, 315; *Watson* v. *Jones*, 13 Wall. [U. S.], 679, 724-727; Religious Corporations Law, §§4, 5)."

The decision of the Court of Appeals came down on March 30, 1926.

A few days later Metropolitan Platon and Dean Turkevich left the premises (R. 9) and appellee has ever* since been excluded (R. 23-24).

Attempt by Appellee to Oust Kedrovsky and Injunction Against Appellee.

Shortly after the coming down of the decision of affirmance in *Kedrovsky* v. *Rojdesvensky*, appellee brought a forcible entry and detainer proceeding against Kedrovsky and another in the Municipal Court of the City of New York (R. 194).** Kedrovsky countered by bringing an action in the Supreme Court, New York County, against appellee and its trustees to enjoin them from occupying the Cathedral and from interfering with occupancy by Kedrovsky (R. 195). Although the signed order is missing from the court files it is clear from the surrounding circumstances that an injunction *pendente lite* against appellee was granted (Pl. Ex. 8: docket entries, pr. R. 204, off. R. 69-70; Pl. Ex. 7 ident.: counter order and notice of settle-

* Except for a few months prior to and during the trial pursuant to stipulation (R. 137) and without prejudice.

** Counsel did not know this fact when he made the concession appearing on page 160 of the record, lines 13-16. It was discovered during the investigation made after the trial in connection with the missing injunction order mentioned in the text.

ment, pr. R. 189, off. R. 250; Pl. Ex. 7-A ident.: memorandum on settlement, pr. R. 192, off. R. 250; Pl. Ex. 7-C ident.: affidavit, R. 193, off. R. 250),* as was suggested by the court (R. 79-80) and practically conceded by appellants (R. 249) at Trial Term. The injunction remained in force until Kedrovsky's death in 1934 since the action was never brought on for trial. The premiums on the injunction bond were regularly paid (R. 200).

Injunction Against Metropoltan Platon.

The final judgment in *Kedrovsky* v. *Rojdesvensky* restrained Metropolitan Platon and Dean Turkevich from occupying the Cathedral and from excluding John S. Kedrovsky, delegate of the Holy Synod and archbishop of the diocese, from the premises and from in any way preventing him from occupying the premises and from interfering in any way with the occupancy of the premises by him (Pl. Ex. 4: judgment, pr. R. 175, off. R. 9).

John Kedrovsky occupied the Cathedral until he died in 1934 (R. 9) but "was recognized by no one" (R. 265). His son, Nicholas Kedroff, was his alleged successor in office (R. 200) and occupied the premises after the father's death until his own death in 1944 (Jurisdictional Statement, p. 12), leaving in possession (R. 160) his younger brother, appellant John Kedroff, who claimed to be a priest of the Renovated Church (R. 138).

* The motion, made informally after the trial (R. 203), that Plaintiff's Exhibits 7 and 7-A for identification be received was not passed on by the Trial Term. After its opinion, which ignored the defense of limitations, was filed, the parties entered into a stipulation (R. 250) enabling the appellate courts to consider these exhibits and Plaintiff's Exhibit C for identification, in case the defense of limitations were to be passed on. The existence of the injunction order is relevant only as proof that the statute of limitations was tolled under Civil Practice Act §24.

Requirement of "Loyalty" to Soviet Regime.

In 1927 the Church in Russia (i. e. the Patriarchal, as distinguished from the Renovated) was permitted by the Soviet government to reopen its central office (R. 80). But the government would brook no renewal of the old conflict. This time the Church must be "loyal" (R. 80).

Patriarch Tikhon had died in 1925. The substitute *locum tenens* of the patriarchal throne in 1927 was Metropolitan Sergius, the three prior appointees in line of succession having been arrested and, presumably, sent to Siberia (R. 57, 107). On June 10, 1927, he issued a statement in which he affirmed in the name of the whole patriarchal hierarchy and flock, their "sincere readiness to be fully law-abiding citizens of the Soviet Union, loyal to its Government and definitely to hold ourselves aloof from all political parties or enterprises seeking to harm the Union" (Pl. Ex. 15-A: declaration, pr. R. 207, off. R. 85).

"Loyalty" to the Soviet government was required by Metropolitan Sergius from all of the clergy abroad (R. 113-114). By "loyalty" was meant refraining from criticism of the Soviet regime either in the pulpit or in the name of the Church (R. 113-115; 122-123). The pledge of "loyalty" from the clergy abroad was necessary because the Soviet government suspected the Church of disloyalty and the conduct of the Church abroad, including America, gave it reason to have suspicion about the conduct of the Church in Russia (R. 114-115). Metropolitan Platon was known in Russia as an opponent to the Soviet government and the whole number of facts about the American Church proved that there was an opposition to the Soviet government (R. 115).

Before Dean Turkevich was made a bishop Metropolitan Platon cabled Metropolitan Sergius asking him to bless the consecration. Sergius replied, demanding that Platon pub-

lish in the newspapers that he recognizes Sergius as the head of the Church and is not active in "politics" (R. 117) that is, publicly opposing the Soviet regime (R. 124-125). Metropolitan Platon refused to publish such a statement (R. 117). Later he issued a declaration in which he proclaimed the American diocese autonomous (R. 223-224), openly opposed the Soviet regime (R. 116 and accused the Church in Russia of becoming a slave of the godless government and aiding it in its fight against God (R. 122).

The policy of the central church authorities in Moscow to require an obligation of "loyalty" to the Soviet regime from the clergy abroad has continued to the present time (R. 125).

Church in Russia Becomes Congregational in Polity by Force of Soviet Decree.

In 1929 the government of the Soviet Republic of Russia (R. S. F. R. S.) issued the following ordinance (R. 58-59):

> "Resolutions and Orders of the religious conventions, conferences and their executive Bodies [organs] can be carried out only by way of voluntary execution by the faithful."
>
> Instruction of the People's Commissariat for the Interior of October 1, 1929, No. 328, §5; Gsovski: Legal Status of the Church in Soviet Russia, 8 Fordham L. Rev. 1, 9 n. 43.

This means that no group of worshippers (usually referred to as the Twenty, since 20 signatures are required for obtaining permission to use a building for religious purposes, Gsovski, op. cit., p. 12) in the Russian Republic need obey the commands of a superior body (R. 58; Gsovski, op. cit., pp. 8-9).

Action of Court of Appeals in *Kedrovsky* v. *Russian Catholic Church*.

The action which John Kedrovsky had brought in 1918 (*supra*, p. 14) reached the Court of Appeals in 1928. The judgment of Special Term, unanimously affirmed by the Appellate Division, directed that the deeds to 135 church properties be delivered to Kedrovsky. The appellants, including Metropolitan Platon, were granted leave to appeal by the Court of Appeals. As stated by Judge Conway (R. 263):

> "* * * Realizing that the legitimate claims of the North American Diocese [*Russian Church in America*], whose temporary autonomy had but recently been declared, were entitled to consideration under the circumstances disclosed, we unanimously reversed the judgments below. (*Kedrovsky* v. *Russian Catholic Church* [1928], 249 N. Y. 75)."

Interdict Against Platon and Appointment of Benjamin as Ruling Bishop.

In 1933 Metropolitan Benjamin came to the United States as the representative of the Patriarchal Church (R. 113). By ukase No. 29, dated March 22, 1933, the acting patriarchal *locum tenens* and his Holy Synod appointed Metropolitan Benjamin to the position of Patriarchal Exarch in America to investigate the affairs of the North American diocese and commissioned him to take over the government of the diocese upon the dismissal of Metropolitan Platon therefrom (R. 224).

In the name of the patriarchate Benjamin demanded from the American clergy a pledge of loyalty to the Soviet government, which they refused to give (R. 211). Then, by decision of August 16, 1933, No. 61, the acting patriarchal *locum tenens* and his Holy Synod declared the proclamation of the North American diocese as autonomous by Metropolitan

Platon in opposition to the will and without the consent of the Moscow patriarchate to be an act rudely violating church discipline "and as such to count it null and void and to revoke it", declared schismatic "the religious group organized around Metropolitan Platon" and the diocesan administration and other organizations existing or formed in the future in this group canonically illegal and all their decisions concerning the Orthodox churches and concerning parishes and in particular their ordaining and appointing bishops and other clergy and church officials illegal and invalid; also decreed that Metropolitan Platon, "as the initiator and chief author of the schism created" be summoned before the Court of Bishops and charged with violations of the ancient canons "and that meantime we place Metropolitan Platon under prohibition from performing divine services until either he repents or the ecclesiastical court shall have rendered a decision"; also proposed to the bishops, priests, church officials and laymen in the North American diocese "that they, breaking off from communion with those who entered into schism, should express to the Patriarchal Exarch (in America)—or directly to the Acting Locum Tenens [Sergius]—(in Moscow) their submission to this present decision and their determination and promise in future to remain in the canonical jurisdiction of the Moscow Patriarchate" (R. 224-225).

This unilateral and *ex parte* action, which broke off spiritual relationship between the mother and daughter churches, was taken with no advance notice, without the preferment of charges and without permitting an opportunity to the *Russian Church in America* to be heard (R. 211).

By decree No. 1005, dated June 29, 1934 (Def. Ex. C: ukase, pr. R. 223, off. R. 36), the acting patriarchal *locum tenens* and his Holy Synod appointed Metropolitan Benja-

min "permanent Ruling Bishop of the Russian North American Diocese with the title of Archbishop of the Aleutian Islands and North America, also reserving to him the status of Exarch of the Moscow Patriarchate in America" (R. 226). This ukase recited that the acting patriarchal *locum tenens* and his synod had heard the facts concerning the refusal of Metropolitan Platon to render canonical submission to the patriarchate, and the declaration of Platon proclaiming the diocese "autocephalous", and referred to the patriarchal ukase of January 16, 1924, dismissing Platon from the government of the North American diocese because of his "acts of counter-revolution directed against the Soviet power" and summoning Platon to Moscow (*supra*, p. 16). The ukase also referred to the decisions of March 22, 1933, and August 16, 1933, above mentioned. The ukase also referred to the verbal proposal of the acting *locum tenens* the opening words of which were stated as follows: "His Eminence, the Exarch in America, reports that he has organized in New York a Diocesan Council and that **our North American Diocese has begun official existence**" (R. 225). After these recitals the ukase decreed the appointment of Benjamin as above mentioned and confirmed the establishment by the exarch of a diocesan council.

Despite these decrees of the patriarchate and its attempt to set up its own diocesan organization in America, the American parishes remained loyal to Metropolitan Platon. Metropolitan Benjamin testified that 50 parishes recognized him as ruling bishop, but he failed to identify them although he promised to do so (R. 130) and there is ground to consider his claim exaggerated (cf. R. 215). *In any event there is no proof that a single one of his parishes was in existence at the time of the 1924 Sobor or at the time of his arrival in this country.* They may all have been founded since then.

Election of Theophilus; Interdict against Him; Adoption of Parish and Church Statutes.

A sobor was held at Cleveland on November 20-23, 1934, reaffirmed the autonomy of the *Russian Church in America*, elected Theophilus (Pashkovsky), then Bishop of Chicago, to be metropolitan and ruling bishop in place of Platon, who had died (R. 25), and adopted certain statutes for the administration of parishes known as the normal parish statutes (R. 76, 77).

In 1935 an interdict like that which had been placed upon Platon "for similar conduct" was issued against Theophilus by the patriarchate (R. 166).

At a sobor held at New York on October 5-8, 1937, the autonomy was again affirmed and statutes for the administration of the Church were adopted (R. 77).

Yonkers Case.

In 1940 the status of the *Russian Church in America* again came before the Court of Appeals on a motion for leave to appeal from the decision in *Waipa* v. *Kushwara*, 1940, 2d Dept., 259 App. Div. 843. In a suit brought to compel a priest to comply with an order of Metropolitan Theophilus transferring him from a church in Yonkers, N. Y. to another parish, he defended on the ground, among others, that Benjamin as appointee of the patriarchate, and not Theophilus, had authority here. The lower courts rejected this contention, finding authority for the creation of the *Russian Church in America* in the 1920 ukase of Patriarch Tikhon (Pl. Ex. 5-A) which was to continue "until such time as the existing civil authorities • • • would cease interfering with the church" (N. Y. L. J., Jan. 6, 1940, p. 97, col. 5). The Court of Appeals denied leave to appeal (283 N. Y. 780).

Failure of Negotiations with Patriarchate.

When Sergius, who had finally, in 1943, been permitted by the Soviet government to assume the office of Patriarch, died in 1944, the *Russian Church in America* sent a telegram of condolence to the patriarchal *locum tenens* which was courteously acknowledged on behalf of the Synod. Then the *Russian Church in America* was invited to send delegates to an All Russian Sobor to be held in Moscow in January, 1945. The delegates chosen by Metropolitan Theophilus were a bishop, two priests and a layman. The Soviet government visaed their passports and offered the use of a military plane from Alaska to Moscow. Later the visa on the layman's passport was cancelled and the military plane that was carrying the bishop and one of the priests put them down in the middle of Siberia. They had to take a train and arrived a week late for the Sobor, at which the present Patriarch, Alexy, had already been elected. They appeared before the Synod, rendered a full report in writing on the condition of the *Russian Church in America* and a written request for the lifting of the suspension on appropriate terms of autonomy (R. 213). A few days later, without having opportunity for discussion, they were handed an ukase by the Patriarch (R. 213).

The ukase (Def. Ex. D: ukase, pr. R. 227, off. R. 37-38) prescribed certain conditions for the lifting of the suspension, among which was the formation of a new district covering all of the American hemisphere, the convocation of an American sobor "consisting of all the bishops, representatives of the clergy and laymen of the **present exarchate headed by Metropolitan Benjamin as well as of the Metropolitan District headed by Metropolitan Theophilus**" (R. 227). The sobor was to elect a metropolitan, subject to confirmation by the patriarchate; as candidates the patriarchate recommended Metropolitan Benjamin and also the

archbishop who was being sent from Russia to preside over the sobor (R. 228). Although Metropolitan Benjamin had advised Patriarch Alexy just prior to his election that an essential condition of reunion between the Mother Church and the *Russian Church in America* was the fullest loyalty to the Soviet power but that he did not think that the *Russian Church in America* would accept that condition (R. 125), the ukase also stipulated that the sobor in the name of the *Russian Church in America* "declares its abstention from political activity against the USSR and gives corresponding orders to all parishes" (R. 228).

The patriarchal ukase was rejected by the Bishops' Council of the *Russian Church in America* at a meeting held in Chicago on May 22-24, 1945 (R. 209). The Metropolitan Council of the *Russian Church in America* later issued a statement explaining the rejection of the ukase (Pl. Ex. 16 - statement, pr. R. 209, off. R. 127).

After referring to the events leading up to the ukase and reciting its terms the statement continued:

> "First and foremost it must be emphasized that the [*Russian Church in America*] considers itself as part of the Russian Church and desires that the suspension be lifted. It appreciates the courtesies which were extended to its delegates in the traditional Orthodox spirit. It ascribes greater importance to such Christian attitude of mutual dealing than to the technicalities to be observed in the lifting of the suspension. On the other hand, the tone and text of the Patriarchal Ukase disclose that the advisers of the Patriarch and the Holy Synod have little conception of the conditions of church life in this country, and of the atmosphere of religious and political freedom in which the [*Russian Church in America*] has developed" (R. 214).

The statement then characterized the establishment of a new metropolitan district as pointless and obviously a

device for justifying a new election of a metropolitan. It also questioned the holding of a sobor under wartime conditions. It insisted that a sobor when convoked should be presided over by Metropolitan Theophilus.

As to the renunciation of political activities against the USSR, the statement said:

> "On October 10, 1944, the Council of Bishops of the [*Russian Church in America*] adopted the following resolution:
>
> 'The Council of Bishops finds it necessary to recommend to the clergy of the Metropolitanate, for the general welfare, not to touch upon political questions and not to make any public speeches on the subject, especially from the pulpit.'
>
> On the whole this recommendation has been meticulously followed. The [*Russian Church in America*] will hold to the same policy in the future. Nevertheless, the [*Russian Church in America*] exists in an atmosphere of religious and political freedom. **Every citizen of the United States and of Canada has the right of freedom of speech.** He may criticize his own government or any other government, so long as he does not go beyond certain limits which have been fixed by statute or decisions of the courts. It would be inconsistent with the duties and obligations of loyal American and Canadian citizens, and contrary to the traditional atmosphere of freedom of speech and political action in these countries, for the [*Russian Church in America*] to give the pledge of loyalty to a foreign power which is implicit in the demand of the Patriarchal Ukase" (R. 216).

As to the holding of an election of a metropolitan the Metropolitan Council saw no justification, there being no present vacancy in the office (R. 216-217).

The statement ended as follows:

> "The [*Russian Church in America*] has sympathized with its mother church in all of her trials and

tribulations. It has rejoiced in the privileges which have been recently accorded to her. But there must be further discussion and clarification of the relationship between the two churches. Why was the [*Russian Church in America*] invited to send representatives to the Sobor of January, 1945? Was it so that they might attend the Sobor? Then why was the visa of the lay representative cancelled and why were the two clerical representatives who made the trip not permitted to arrive in time for the Sobor? Why were those representatives not given an opportunity to discuss the conditions of the Ukase but merely handed the completed document for delivery to Metropolitan Theophilus? It was an arduous journey for them to make if their function was only that of couriers. The Ukase might more economically have been brought here by Exarch Benjamin, who went to Moscow and was present at the Sobor.

The substance of the Ukase, as well as its tone and all of the circumstances leading up to and surrounding the issuance of the Ukase, suggest the high-handed methods of an autocratic bureaucracy. The [*Russian Church in America*] is flourishing in the atmosphere of democratic freedom. It was no fault of the American branch of the Russian Orthodox Church that by force of circumstances it was compelled to establish its own church administration. It was no fault of the [*Russian Church in America*] that the Patriarchate laid a suspension on it because its clergy declined to give a pledge of loyalty to the Soviet power.

It is an American Church and an American Church it must continue to be" (R. 218-219).

In September, 1945, an archbishop, Alexis, came to the United States as an ambassador from Patriarch Alexy (R. 137). Appellant Kedroff, who had already been sued in this action (R. 67), requested and received reordination at

the hands of Metropolitan Benjamin and the patriarchal envoy and surrendered possession of the Cathedral to them (R. 138) in about October, 1945 (R. 137). The envoy stayed six months (R. 137) but apparently made no progress toward rapprochement with the *Russian Church in America*.

In November, 1946, a sobor of the *Russian Church in America* was held at Cleveland. By a vote of 187 to 61, the following resolution was adopted (Def. Ex. A: resolution, pr. R. 222, off. R. 30):

> "WHEREAS, the 7th All American Sobor of the Russian Orthodox Church of North America having assembled in Cleveland, Ohio, on November 26-28, 1946, and having thoroughly considered the relations of our Church in America with the Patriarchal Church of Moscow and all Russia, and affirming our complete faith and loyalty to His Eminence, our elected, Metropolitan Theophilus;
>
> NOW, THEREFORE BE IT RESOLVED, that His Beatitude Alexy, Patriarch of Moscow and All Russia be requested to continue us in his fold and be our Spiritual Head, conditioned upon the Church in America retaining its present autonomous status and the right of self government. That the periodic All American Sobors of the Russian Orthodox Church of North America shall remain the Supreme Legislative and Administrative body of our Church; at these Sobors the Church shall continue to elect its own Metropolitan, and make and adopt its own laws by which the Church in North America is, in all respects, governed;
>
> . . . . . .
>
> AND BE IT FURTHER RESOLVED that in the event that the aforesaid conditions are found not to be acceptable to His Beatitude, the Patriarch of Moscow and all Russia, the Russian Orthodox Church of North America shall continue, and does remain, self-governing until such time as the Patriarch of Moscow and all

Russia finds it possible to accept the conditions herein stated."

The substance of the resolution was cabled to the Patriarch (Pl. Ex. 17: cablegram, pr. R. 219, off. R. 131) and a reply, the translation of which follows, was received on January 25, 1947 (Pl. Ex. 17-A: cablegram, pr. R. 220, off. R. 131):

"Metropolitan Theophilus,
59 East 2nd Street, N. Y. C.

I have received your Eminence's telegram today stop I welcome decisions of Cleveland Sobor stop On principle I have no objections against autonomy for our Orthodox Church in America stop In peace-loving spirit I commission Metropolitan of Leningrad Gregory leaving for America in near future discuss all questions together with your Eminence stop God's blessing clergy and all flock stop From now on I consider your Eminence and all your clergy in unity of prayer with us celebrate service together with Metropolitan Benjamin in token of this communion stop Christ is with us and always will be stop

PATRIARCH ALEXY"

Metropolitan Gregory of Leningrad and Stalingrad, a permanent member of the Patriarchal Synod in Russia (R. 163), came to this country shortly before the trial with a view of negotiating with representatives of the *Russian Church in America* to see whether a basis of adjustment of their differences could be found (R. 131). Evidently he was unsuccessful as he appeared as a witness on behalf of appellants (R. 162) and testified that the *Russian Church in America* was still under suspension by decision of the Patriarch and his Synod (R. 166).

Use of Moscow Patriarchate as Instrument of Propaganda.

Although it is still the policy of the patriarchate to require the clergy outside of Russia to refrain from criticism of the Soviet regime (*supra*, p. 33) on the ground that clergymen should occupy themselves "with spiritual matters, and nothing more" (R. 125), the patriarchate follows a different rule for itself. An article in The New York Times of April 2, 1948, bearing a Paris dateline of the day before, stated:

> "A new campaign to stamp out religious influence in the Soviet Union is reported to be under way. This drive apparently is directed against minor and local clergy and not against **the top hierarchy of the Russian Orthodox Church, which is completely and officially in sympathy with the Communist Government.**
>
> It may appear paradoxical that village priests are not in complete accord with the subservient patriarchates [*sic*] under which they function. Nevertheless reports have been leaking out to the effect that more than one local priest has intimated to his parishioners disagreement with the hierarchy's attitude and has been menaced with state disapproval. * * *
>
> **The top of the Soviet orthodox hierarchy meanwhile has become so active in its open support of the Government that its official publications are now engaged in heated attacks on the Western powers and definitely mixing in lay politics.**
>
> **The last issue of the Journal of the Moscow Patriarchate to reach here contained a long diatribe against so-called United States and British 'war mongers' in an article entitled 'The Devilish Spirit of a New Aggression Threatening the People's Peace' * * *."**

Since the publication of the article above quoted, the patriarchate has engaged in a systematic campaign for "peace"—Soviet style. It has published a collection* of decisions, epistles, addresses, appeals, speeches and articles, under the title (in translation) "The Russian Orthodox Church in the Fight for Peace" (*infra*, p. 151). Many of these have appeared in its official monthly publication, the Journal of the Moscow Patriarchate*. Extracts (in translation) from articles in the Journal are given below (Appendix C, *infra*, p. 118).

The Metropolitan Nicholas of Krutitsk and Kolomen, who has evidently played a prominent part in the campaign for "peace", is the second ranking hierarch in the Church of Russia, as witnessed by the order of signatures on the address of the Patriarch and Synod to the Security Council of the United Nations (*infra*, pp. 128-129).

Summary of Argument.

I. As a basis for its determination that the accustomed beneficiaries should enjoy their traditional houses of worship under the administrative control of the governing authorities of the *Russian Church in America*, rather than that of the envoy of the Moscow patriarchate, the legislature is to be presumed to have acted reasonably in tracing and identifying the beneficiaries of religious trusts, in preventing a diversion of the trust properties and in deciding which trustees might be relied upon to carry out more effectively the purposes of the trusts.

The words "trusts" and "trustee" are not used in a technical sense, since a religious corporation holds full legal and beneficial ownership of the property acquired by it by unrestricted gift, but the state has an interest in seeing that the property is applied to the corporate purposes.

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* Copies may be found in the Library of Congress and in the library of the State Department.

The finding of the legislature that the *Russian Church in America* was identical in fact with the North American diocese, as it existed at the time of the Detroit sobor of 1924, was not contradicted by the evidence and should be accepted by this Court. On the basis of this finding it was reasonable for the legislature to determine that the members of the *Russian Church in America,* being the original beneficiaries of the properties dedicated to the use of the diocese prior to April 2-4, 1924, and having done nothing to forfeit their interest in the properties, were still the beneficiaries of those properties.

The members of the *Russian Church in America* are not schismatics or secessionists. They followed the instructions of Patriarch Tikhon (ukase No. 362 of 1920) in organizing an administratively autonomous district in 1924. Its polity is "sobornal", in the spirit of the enactments of the Great Sobor at Moscow in 1917-1918. The members of the diocese had no alternative in the face of the threatened seizure of their properties by the schismatic Kedrovsky and the threatened dismissal of Platon for his opposition to the Soviet regime.

The members of the *Russian Church in America* have likewise been justified in rejecting all demands of "loyalty" to the Soviet regime. There is no canonical basis for that demand. It contravenes the American tradition of free speech. If it were complied with, the churches would become centres of Soviet propaganda. The moral education of the children and young people would be affected.

The legislature is to be presumed to have found upon sufficient evidence that there would be a diversion from the original trust purposes if it were held that only those worshippers who accepted the administrative control of the Moscow patriarchate were entitled to enjoy the properties which were dedicated to the use of the diocese before April

2-4, 1924. The state has power, in the exercise of the cy près prerogative, to decree that the properties may be enjoyed by the original beneficiaries even although the administrative tie, which originally existed with central church authorities in Russia, has been broken.

The determination of the legislature that the governing authorities of the *Russian Church in America* are the trustees who may be relied upon to carry out more effectively and faithfully the purposes of the religious trusts created for the benefit of the diocese prior to April 2-4, 1924, is supported by sufficient evidence and is reasonable. The patriarchate is being utilized by the Soviet government as an instrument of propaganda. This is shown by the record, by facts of common knowledge and by the patriarchate's own official publications.

The patriarchate has been shorn of the power to administer even the church edifices located in Russia. By force of governmental decree, the Church in the Russian Soviet Republic is congregational in polity. No local congregation is subject to superior administrative control. If, therefore, the administrative control of the American properties by the patriarchate is based on rules having the force of contract, as pleaded in the amended answer (R. 3), the contract has been rendered impossible of performance on the part of the parties located in Russia who still comprise the most numerous part of the Russian Church. This is an added reason that the patriarchate is not the proper trustee.

II. Neither the grant of a charter to a religious corporation nor the regulation, within reasonable limits, by the state of the conditions upon which the corporate property is to be held and administered, violates the principle of the separation of Church and State.

Except for Virginia and West Virginia all of the states grant charters to religious corporations. This Court has intimated that the early legislators of Virginia were excessively rigid in this respect. New York, on the other hand, has been liberal in complying with the wishes of applicants for charters of religious corporations. The rule of denominational control, however, was not enforced in New York until 1875. This is a rule of state policy, which may be repealed or abrogated by the legislature, as it may deem in the public interest.

On the whole the rule of denominational control has worked well. But it does not fit all cases e.g. the unique situation presented by the justifiable break in administrative connection between the North American diocese and the patriarchate, the unjustifiable demands for "loyalty" to the Soviet regime and, finally, the utilization of the Moscow patriarchate as an instrument of Soviet propaganda. It was competent, therefore, for the legislature in the public interest to prescribe that the denominational control of the properties here should be exercised by the *Russian Church in America*. This was in effect an amendment of the corporate charters previously granted by the state, all of which were subject to the reserve power.

Even if it is held that the rule of denominational control is imbedded in the federal constitution a state may validly inquire into and pass on the competence under their own rules of the denominational organs attempting to exercise such control.

By laying down a rule in advance for the guidance of its citizens the legislature promoted public peace and order and discouraged litigation. The courts of New York had been plagued with lawsuits arising out of the situation of the Church of Russia. This is in itself a reasonable basis for the legislation. It would be an unreasonable hardship

to require the members of every *Russian Orthodox church* in New York (as that term is defined in §105 of the act), whenever an attempt was made to seize control of its property in the name of the patriarchate, to dig up and assemble the evidence required to convince a court that the patriarchate was not the proper administrator.

III. Religious liberty is promoted, not abridged, by the legislation.

If the Moscow patriarchate is held to be in perpetual control of the American church properties—beyond the reach of courts or legislatures—then truly the great body of worshippers in this country are hampered in the exercise of their religion: they will forfeit their shrines rather than bow their necks to Stalin. Conversely, if they are protected in the enjoyment of their accustomed places of worship, their freedom of religion is promoted.

Traditionally the administrative connection of Protestant religious bodies here with mother churches abroad has tended to be broken. The classic example is that of the Episcopal Church. It is unthinkable that its canonical dependence on the Church of England would have been enforced by American courts in case of a dispute over the control of properties here. The colonists were terrified at the thought of English bishops coming here before the Revolution. When Madison and Jefferson planned for religious liberty they were not thinking of protecting the canonical rights of the Bishop of London to exercise administrative control of the Episcopal churches in this country.

It is conceivable that even the Church of Rome in dire necessity might need legislation of this kind to protect its properties here in case of the seizure and drugging of the Pope by Soviet puppets.

IV. The religious freedom of Metropolitan Benjamin is not affected.

He came here in 1933. Not until twelve years later did he make a move to gain admittance to the Cathedral. The privilege of presiding there could not have meant so much to him.

The legislation leaves him free to worship or preside in any church or cathedral where he may be welcome. He is even free to *worship* in the Cathedral; but he may not *officiate* there unless permitted to do so by appellee or its licensees.

If the defeated party in every suit over the administration of property dedicated to religious uses were able to upset the judgment by raising the cry of religious liberty, it would be futile for the courts to entertain such suits.

V. The act does not "outlaw" or "suppress" the patriarchate in the state.

The compulsory mandate of the act applies only to religious corporations which fall within the definition of "Russian Orthodox church" contained in §105. A corporation organized as an independent unit, or founded since April 2-3, 1924, for the purpose of adhering to the patriarchal jurisdiction, is not affected by the mandate. There is no proof that any corporation affected by the act recognizes or is attempting to recognize Benjamin as ruling bishop.

VI. The act does not compel a "transfer" of the Cathedral from one jurisdiction to another.

The Cathedral has always been, whether as parish church, diocesan see or administrative center of the *Russian Church in America*, an integral part of an identical body, whether diocese or autonomous district (regardless of the actual occupancy by the Kedrovsky family, an

unfortunate but irrelevant incident). The corporations owning the Cathedral in succession were under the administrative control of the Most Sacred Governing Synod until 1917-1918, the patriarchate until April 2-4, 1924, and the *Russian Church in America* since then to the present. The statute merely determines that the *Russian Church in America* should continue in control of appellee.

The fact that Benjamin is in actual occupancy is coincidental, but irrelevant.

VII. None of the other alleged errors assigned by appellants merits serious consideration.

The statute effects no transfer of property. The full ownership of the Cathedral remains in appellee. The Church of Russia is not a juridical person, under Russian or American law. It has no vested property rights in the Cathedral.

No federal question is presented by the fact that the action was commenced one day before the statute became effective.

The remarks of the Court of Appeals as to the disposition of the case in the absence of the statute in question on this appeal have not the finality required for review in this Court.

The use of the *Kedrovsky* record was immaterial.

Appellants' motion for reargument in the Court of Appeals called particular attention to the alleged failure of that court to rule on the defense of limitations, as appellants admit (brief, p. 48). The denial of the motion must, therefore, be deemed to have been a ruling that the defense was without merit. The court was not required to write an opinion on the point. Whether or not the defense has merit is not a federal question.

ARGUMENT.

POINT I.

As a basis for its determination that the accustomed beneficiaries should enjoy their traditional houses of worship under the administrative control of the governing authorities of the *Russian Church in America*, rather than that of the envoy of the Moscow patriarchate, the legislature is to be presumed to have acted reasonably in tracing and identifying the beneficiaries of religious trusts, in preventing a diversion of the trust properties and in deciding which trustees might be relied upon to carry out more effectively the purposes of the trusts.

The words "trusts" and "trustees", in the above headnote, are not used in a technical sense. The legislature was dealing with religious corporations and the administration of the property which had been donated to them. A gift to a religious corporation for its general purposes does not create a technical trust (Restatement of Trusts, sec. 348, intro. note; 3 Scott on Trusts § 348.1; ibid., 1951 Supp.; cf. *St. Joseph's Hospital* v. *Bennett*, 1939, 281 N. Y. 115, 121; *Tabernacle Baptist Church* v. *Fifth Avenue Baptist Church*, 1901, 1st dept., 60 App. Div. 327, 335, aff'd, 1902, 172 N. Y. 598). The corporation takes "the whole legal and equitable interest in the gift" (*Levy* v. *Levy*, 1865, 33 N. Y. 97, 116; *Reformed P. D. Church* v. *Mott*, 1838, Ct. Ch., 7 Paige 77, 82; *Bird* v. *Merkles*, 1895, 144 N. Y. 544, 551).

The state, however, has an interest in seeing that the property of a religious corporation is applied to its proper corporate purposes (cf. *St. Joseph's Hospital* v. *Bennett*, *supra*, 281 N. Y. at p. 119). The state is the supreme guardian of property devoted to a charitable use (cf. *Matter of*

Trustees of N. Y. Protestant Episcopal Public School, 1864, 31 N. Y. 574, 592). It exercises "a general superintendence over charities as *parens patriae*". (Fowler: Charitable Uses, Trusts and Donations, p. 57; cf. *Mormon Church* v. *United States*, 1890, 136 U. S. 1, 50-64).

In exercising its powers over property dedicated to religious uses (whether or not subject to technical trust) the state may determine (a) who are the rightful beneficiaries (b) what are the original purposes or, if they have become impracticable or impossible of literal fulfilment, what are the purposes nearest to the original which can be fulfilled (cy près) and (c) who are the proper trustees or administrators.

A. The finding of the legislature that the *Russian Church in America* was identical in fact with the North American diocese, as it existed at the time of the Detroit sobor of 1924, was not contradicted by the evidence and should be accepted by this Court.

The term "Russian Church in America" is defined in § 105 of Article 5-6 to refer to a "group of churches, cathedrals, chapels, congregations, societies, parishes, committees and other religious organizations of the Eastern Confession." This language is comprehensive, evidently intended to include spiritual bodies as well as religious corporations.*

The definition then specifies the four names by which the "group" was known during four successive periods. The first three of these were the names of the mission or

* For the distinction between a religious corporation and the spiritual body with which it is interrelated on the temporal plane, see *Walker Memorial Baptist Church* v. *Saunders*, 1941, 285 N. Y. 462, 472. A religious corporation "is the humble handmaid of the church, created by the state for the purpose merely of conducting the business affairs of the church" (Zollman: American Church Law, 1933, §146).

diocese in North America as it was known from 1793 to 1924 (R. 7-8). The fourth is the name of the *Russian Church in America* as now existing.

Thus §105 identifies the existing body with the mission or diocese previously existing.

No proof was offered to contradict this legislative finding.* While it is true that six delegates to the 1924 sobor voted against the resolution declaring the temporary autonomy and two delegates abstained (R. 187), there is no proof that the parishes represented by these eight delegates attempted to withdraw from the "group". The same may be said as to the parishes which were unable, because of the expense or otherwise, to send delegates to the sobor. They are presumed to have assented to the expressed will of the "overwhelming majority" (R. 187) who voted for the resolution (*cf. County of Cass* v. *Smith*, 1877, 95 U. S. 360, 369). *De facto*, therefore, whatever the canonical validity of their assumption of autonomy, the organizations which constituted the North American diocese on April 2-4, 1924, became the *Russian Church in America*. Unless their conduct worked a forfeiture of the properties which had been dedicated to their use (whether as a diocese or as parochial units) prior to the 1924 sobor, the members continued to be the beneficiaries of those properties after the sobor and still are.

So far as concerns the beneficiaries of the Cathedral, it is clear that originally the property was dedicated to the use of the parish of St. Nicholas (*supra*, p. 17). The beneficiaries were the worshippers who attended the parish

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* In purporting to state the substance of the statute, appellants state (brief, p. 2) that the group called the *Russian Church in America* "had belonged *to a larger group*" constituting the old diocese. There is no such implication in the statute and no such proof in the case. The two bodies were identical, as found by the legislature.

church. They also, under the law of New York, were the members of St. Nicholas' Corporation, although they had no voice in selecting the trustees* or officers of that corporation (*Robertson* v. *Bullions*, 1854, 11 N. Y. 243; *People's Bank* v. *St. Anthony's R. C. Church*, 1888, 109 N. Y. 512). When the church became a cathedral, the beneficiaries of the trust, and the members of the corporation, automatically widened to include all of the worshippers in the diocese.

Appellants make the extraordinary suggestion that the exclusive beneficiary of the Cathedral has always been and is the ruling bishop (appellants' brief, pp. 8, 14, 42). They concede to the faithful some "undefined rights * * * subordinate to the rights of the appointed archbishop" (p. 9).

Their own proof, however, belies this theory. In the papers supporting the application of St. Nicholas' Corporation to the Supreme Court of New York for leave to convey the Cathedral to Archbishop Evodokim (Def. F.: order, petition, affidavits, etc., pr. R. 229, off. R. 71-72) it was several times stated that title to the properties of the Church in North America was held in trust for the Church *and its parishioners* (R. 230, 231, 233, 235). Also, the finding of fact, made by Special Term in *Kedrovsky* v. *Rojdesvensky* and not disturbed on appeal, which was introduced in evidence in the present case by appellants, was to the effect that title to the Cathedral was in a "domestic religious corporation,** subject to a trust, *for the uses of said Russian Orthodox Church [in North America] and the members thereof,* according to the canons and rules of said Church,

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* The trustees were the Russian ambassador and consul general, as then required by statute (Rel. Corps. L., §91).

** St. Nicholas' Corporation, which then had title, was referred to, although its name was erroneously stated in the finding.

pursuant to which the Ruling Archbishop" was entitled to occupy the premises, etc. (R. 70).

Despite appellants' cryptic reference to "the interlocking status and relationship of the ruling archbishop of a diocese and its cathedral under the canon law, usages and discipline of all hierarchical churches" (appellants' brief, p. 9), there is nothing mysterious about the relationship under the law of New York. The clergy, whether ruling archbishop or humble subdeacon, are the servants (ministers) of the faithful. "* * * whosoever will be great among you, let him be your minister; And whosoever will be chief among you, let him be your servant" (Matt. 20-26). As servants of the worshippers, whether a parish congregation or a diocese, they are not *ipso facto* vested with any estate, legal or equitable, in the real property which it is their duty or privilege to use for religious purposes under the rules of the spiritual body to which they are subject. The entire beneficial ownership is in the religious corporation of which the worshippers are members. The clergy are merely licensees of the owner (cf. *Youngs* v. *Ransom*, 1859, Gen. Term, Kings, 31 Barb. 48, 55).

So far as concerns the Cathedral specifically, the terms of the trust upon which it is held are clearly set out in appellee's charter (L. 1925, c. 463, R. 169). Appellee was authorized to acquire, take and hold, in trust or otherwise, all property necessary or proper for its objects or purposes, which were specified to be "the acquiring, maintaining and management of a cathedral church and its appurtenances in the city of New York *as a central place of worship of the Russian Orthodox Church in North America* * * * together with the residence of the ruling archbishop * * * and such incidental foundations, schools, facilities and other religious, charitable and educational work as may be properly

connected therewith *in and for the said Russian Orthodox Church in North America*" (R. 169-170).

This charter had been drafted by Metropolitan Platon with the help of George Zabriskie (who later was to act as his counsel in the Court of Appeals on two appeals, as shown by the reported decisions). Mr. Zabriskie had interested several members of the legislature in passing the act (R. 171-172). The inference is inescapable that the term "Russian Orthodox Church in North America," as used in the act, referred to the recently created *Russian Church in America*, of which Platon was then the head. It is notable that no mention whatever is made in the act of a *diocese* or of the Moscow hierarchy.

Appellants may seize on the reference to the appointment of Platon by "His Holiness, the late Patriarch Tikhon," appearing in the minutes of the first meeting of appellee's trustees (R. 174), as rebutting the inference above mentioned. The reference was perfectly natural. The *Russian Church in America* considered itself a part of the mother church of which Tikhon had been the beloved head. "We love and always will love the Church of Russia," said Mr. Greaves at the 1924 sobor (R. 182). The Russian Church in America "considers itself as part of the Russian Church," according to the official announcement of July 10, 1945 (R. 214). Platon had chosen to litigate with Kedrovsky on the issue of which was the validly appointed bishop, rather than on the issue of whether the Detroit sobor of 1924 had acted validly. The New York court had a few months previously adjudged him to be the validly appointed bishop without reference to the 1924 sobor. The late Patriarch's name was deeply revered by the American flock of which he had once been the shepherd. The reference in the minutes to his appointment of Platon has no significance.

The beneficiaries of the Cathedral trust, then, are the worshippers who formerly constituted the membership of the North American *diocese* and now constitute the membership of the *Russian Church in America.* This is true of all of the properties which were dedicated to the use of the *diocese* or any of its components prior to the 1924 sobor, unless by their conduct the members have forfeited their interest.

What were they to do? On the one hand, their beloved patriarch was confined to a monastery, seriously ill, with four doctors in attendance placed there by the Soviet government (R. 181). Only four months after confirming in writing the appointment of their ruling bishop, the patriarch had issued a decree dismissing him for publicly criticising the Bolshevik regime. On the other hand, the schismatic Kedrovsky, a married man posing as a bishop, the servant of a group which had declared war on capitalism to be holy to Christians (*supra,* p. 13), was already on the American scene, appealing to the courts for control of their properties. Were they to stand meekly by and lose their properties to Kedrovsky by default? Were they to submit meekly to the decree dismissing Platon, which they knew had been extracted from the ailing patriarch under duress (R. 184), and await the coming of a new appointee? They knew "that no bishop will be permitted to leave Russia for abroad except a 'Living [Renovated] Church' one" (R. 186). They were unanimous in their desire "to keep our American Church from Soviet interference" (R. 186).

Fortunately, from a strictly technical point of view, they had canonical authority to organize themselves into an autonomous district. Appellants suggest (brief, p. 11n.8) that the patriarchal ukase of November 20, 1920, No. 362, was not relied on to, and did not, justify the action

of the Detroit sobor. The contrary is true. The ukase was referred to in unmistakable terms by a speaker, Fr. Chepeleff, as a "circular letter" addressed by Patriarch Tikhon to all diocesan bishops (R. 185, where the date is given as 1921, evidently an inadvertent error in the speech or transcription). Appellants say that the ukase was addressed to *dioceses in Russia* and had no application to the American diocese. But appellants' own witness, Metropolitan Gregory, testified that the ukase "was limited in time to such period as communications between the Patriarch and *the bishops outside of Russia* were unavailable" (R. 166), thus implying that the ukase was addressed to such bishops. The occasion for its issuance was doubtless the civil war which had cut off communication between the central church office and the dioceses in the south of Russia, but the ukase was not limited by its terms to dioceses within Russia and was never revoked as to the dioceses abroad (R. 155). The political pressure upon Patriarch Tikhon and his confinement deprived him of a true means of communicating with the North American diocese (R. 140-141), so that the ukase became operative in the case of that diocese. This was the opinion of the New York courts in the Yonkers case (*supra*, p. 38), and may, therefore, be presumed to have been found by the legislature, which is assumed to know of precedent judicial decisions on the subject matter of a proposed enactment. The question whether ukase No. 362 authorized the action of the Detroit sobor, so far as the decision of that question affects the administration of property in New York of a domestic religious corporation, being one of state law (cf. *Sims* v. *Greene*, 1947, 3 circ., 160 F. 2d 512, 515), there would seem to be no occasion for this Court not to accept the ruling made in the Yonkers case and adopted in the decision now appealed from.

In establishing the *Russian Church in America* the members of the diocese, under the leadership of Platon, voted for the "sobornal" or conciliar polity (i.e. government by bishops, clergy and laymen in council or convention assembled) which had been enacted by the Great Sobor of 1917-1918 and was referred to under point 4 of ukase No. 362 (R. 178). The Church was to be governed by an archbishop, bishops' council, council of clergy and laity and periodic sobors of the entire Church (R. 187). The committee to draft a constitution was to be guided by the enactments of the Great Sobor (R. 188). These resolutions have been carried out.

The *Russian Church in America* is governed by sobors of the entire Church (which have been held in 1924, 1934, 1937, 1946 and 1950), a metropolitan archbishop, a bishops' council and a metropolitan council of clergy and laity. The statutes for administration of parishes were adopted at the 1934 sobor (R. 77) and those for government of the Church at the 1937 sobor (R. 76). The facts recited in this paragraph so far as occurring before 1945, are presumed to have been found by the legislature, which made specific reference to most of them in §107 of Article 5-C.

It may be noted here that appellants' description of the Church of Russia as "hierarchical" is quite inaccurate, if they are referring to canon law and not to practice. The polity, as enacted at the Great Sobor of 1917-1918, was definitely "sobornal." True, as matters turned out, that polity may never have been put into practice in Russia because of political conditions. The American lay delegate was refused a visa to attend the 1945 sobor in Moscow (*supra*, p. 39). The parish statutes adopted by that sobor and imposed on the American parishes in the patriarchal diocese "almost" abolish "the right of electing leaders, which was promulgated by the all-Russian Sobor of 1917-

1918 according to an American standard which is in harmony with conditions of life in democratic America" (R. 245). It is ironical that the patriarchate should attempt to impose a *hierarchical* polity on its American diocese, when the polity of the Church of Russia, as adopted at the Great Sobor, was *sobornal* and its polity since 1929, as imposed by Russian law since 1929 (*supra*, p. 34) is congregational. The legal effect of the fact last mentioned will be discussed later (*infra*, p. 84).

B. The legislature is to be presumed to have found upon sufficient evidence that the members of the *Russian Church in America* have acted correctly in rejecting all demands of "loyalty" to the Soviet regime.

Appellants (brief, p. 30) assert that there is no proof that such a demand was made. The evidence is conclusive that the demand was made repeatedly.

Metropolitan Benjamin testified (R. 113-125):

> "Q. When the Central Administration of the Patriarchal Church was set up in 1927, did you give the acting locum tenens a pledge of loyalty?
>
> A. No oath was required, but *loyalty to the Soviet Government was required,* with the understanding that I would not participate "in any political fight against the Government. But I was not under the obligation to recognize or defend this regime. I had to be non-political, not having any political affiliations.
>
> . . . . . .
>
> Q. *Did acting locum tenens* [of the patriarchal throne] *Sergius demand an obligation of loyalty similar to the one given by you from the other members of the Russian Orthodox clergy abroad?*
>
> A. *Yes,* in the sense of refraining from political fight but not to defend the Soviet Government.

Q. What do you mean by a political fight?

A. *To preach in the Church against the Soviet regime, to talk in other places in that direction, but in the name of the Church, against the Soviet regime.*

* * * * * * *

"Q. *Do you consider any criticism of the Soviet regime as a violation of that pledge?*

* * * * * * *

A. *For the benefit of our Church, our Church on the whole required any absence of criticism.* It was for the good of the Church and it was an expression of the Christian attitude to the Government.

Q. *And that applies to the Russian clergy abroad?* A. *Yes,* because the Church is one, and it was necessary for the main center of the Church in Russia, but the Church never demanded that the churches abroad should recognize Communism or anything like that.

* * * * * * *

Q. *What was the necessity of asking the clergy abroad to give this pledge of loyalty?*

* * * * * * *

A. *Because the Soviet Government suspects the Church of disloyalty against the Government, and the conduct of the churches abroad gave reasons to have suspicions about the conduct of the Church in Russia.*

Q. *Did that apply to the American Church?* A. *Yes, sir.*

* * * * * * *

* * * When the question came up about the ordination of Reverend Turkevich as the Archbishop [sic] Leonty * * * Metropolitan recognized Metropolitan Sergius and asked permission for the ordination.

* * * * * *

* * * He gave the following answer: "* * * *ask Metropolitan Platon to publish* in the newspapers

• • • *that he* recognizes Metropolitan Sergius as the head of the Church and *is not active in politics.*

• • • • • • •

Q. I again want to make sure, your Eminence, that when you talk about political activity you don't mean what we Americans usually call political activity, that is, actively running for office or supporting candidates for office, but merely mean public speaking and writing, is that correct? A. *The answer of the Russian Church is absolutely clear.* It cannot prevent any citizen from fulfilling his obligations, and does not demand it. *It only demands refraining from opposing the Soviet Government, refraining, but not subjugating to it.* And I am repeating, that is for the good of the Church. It is an obligation of the Church to act in this manner.

Q. When you say 'opposing the Soviet Government,' you mean criticizing it in speeches or writing? A. *As individuals, they may criticize, but they cannot do that in church or in the name of the Church* because that would be injurious to the Church. Patriarch Tikhon pointed that out too literally in these words, 'Understand at last that *your political actions abroad are injurious to the Church,* not to the Soviet regime, but to the Church'.

Q. *That policy which your Eminence has referred to of requiring some kind of an obligation, whatever it was, from the clergy abroad continued continuously from 1927 to the present day, did it not?* A. It demands that a member of the clergy occupy himself with spiritual matters, and nothing more.

Q. No, *I asked as to whether the policy* of the Central Administration of the Patriarchal Church in this regard *was continuous from 1927 to the present time?* A. *Yes.*

Q. You advised the present Patriarch just prior to his election that an *essential condition of reunion between the Mother Church and the American Church*

was the fullest loyalty to the Soviet power, did you not? A. (In English) *Yes.*

• • • • • • •

Q. And you advised him that you didn't think that the American Church would accept that condition, did you? A. I wrote him directly that this condition will be difficult to accept by the American Church and asked him to remove this question • • •

Q. But, nevertheless, he did not follow your advice, did he? A. *In his Ukase of 1945* [Def. Ex. D] *he made the demand that the Church refrain from opposition to the Soviet regime."*

Thus it is established, out of Metropolitan Benjamin's own mouth, that the pledge of "loyalty" was demanded (1) from the American clergy when Benjamin came here; (2) from Platon at the time of the exchange of telegrams regarding the consecration of Bishop Leonty; (3) from the American parishes (i. e. clergy *and laity*) in the ukase of February 16, 1945, and (4) as a continuous *policy* to the present time.

The *policy* evidently covers laity as well as clergy: for example, Metropolitan Benjamin applied it to the legal adviser of the Russian Church in America (R. 123).

As to the canonical basis for the requirement of loyalty, Benjamin testified (R. 123):

"Q. • • • Will you point out to me any provision of the Statutes of 1917-1918 or of the ancient Canons or of the Scriptures which justified the acting locum tenens to require from the clergy abroad any obligation whatever to refrain from what you call political activity?

• • • • • •

A. Jesus Christ himself said, 'Give to God what is God's and to Caesar what is Caesar's.' In the

> Church canons we "have nothing to indicate that members of the Church should be active in politics. But, on the contrary, [it] is pointed out that peoples of the Church should not occupy themselves with affairs of the world, that *members of the Church should not occupy themselves with affairs of the world.*"

It should be noted that this language is broad enough to include laity as well as clergy.

In other words, according to Metropolitan Benjamin, no American member of the Church, clergyman or layman, may speak in the name of the Church on such burning issues as the slave labor camps in the Soviet Union, the return of prisoners of war held by the Soviet government, the obstruction by that government of reasonable efforts to promote disarmament, the connection of that government with the Korean situation, etc.

If the patriarchate were consistent in applying the same rule to itself as to the American faithful, it could at least be said that it was following a plausible, although extremely severe, rule of discipline, more appropriate to the primitive Church in the hostile Roman Empire, or to cloistered monks in the modern world, than to a large body of American citizens leading active lives in the community.

But, as has been pointed out (*supra*, p. 45), the patriarchate itself is very actively mixing into the affairs of the world. Yet it would forbid the American faithful to follow the practice of the preponderant majority of religious bodies in the United States who are making themselves heard, either singly or through such federations as the National Council of Churches, on questions where a moral issue is at stake.

> "The view of those favoring the entry of the Church into the arena of public life for the purpose

of accomplishing moral reforms is undoubtedly very strong in America, both in Protestant and Catholic Churches. It is represented in general by the Federal Council of Churches of Christ, the social-welfare conferences and councils of the various Churches, of which the National Catholic Welfare Conference is one of the most prominent, and by periodicals, such as *The Churchman* (Episcopalian background) of New York, *The Commonweal* and *America* (Roman Catholic) of New York, and *The Christian Century* (Protestant) of Chicago. It also has its representatives at most of the great theological seminaries, such as the Union Theological Seminary, Yale Divinity School, the Divinity School of the University of Chicago, the Catholic University of America, and the Jewish Institute of Religion."

Stokes: Church and State in United States, v. III, p. 670.

According to Metropolitan Benjamin, although the patriarchate is speaking on the burning issues of the day, the lower clergy and laity must remain silent. Or perhaps he would permit them to subscribe to the utterances of the patriarchate which invariably echo the official Soviet line.

It may be imagined what a part the representative of the *Russian Church in America* would play in the deliberations of the National Council of Churches if he were subject to such a policy. More likely, the patriarchate would forbid membership in that organization, as it has itself refused to join the World Council of Churches which it considers a tool of Anglo-American imperialists.

But there are even more important implications of the policy which Metropolitan Benjamin swore to be still in force. The Church is not only a religious force in America,

it is a moral and educational force. The children attend church schools and imbibe not only religious ideas but ideas on the questions of the day in all fields. The pastors are the source of moral and educational stimulation as well as religious. The parish houses are centres of social and cultural life. These facts are particularly true of the *Russian Church in America* whose young people have developed a remarkably active federation of parish clubs.*

Are all of these centers of educational and social life to be subject to the censorship required by Metropolitan Benjamin's policy? Whenever a question affecting the Soviet government comes up, is a pall of silence to descend on the gathering, lest there be a violation of the pledge of "loyalty"?

The *Russian Church in America* has consistently refused to give this pledge. Its Metropolitan Council has officially announced that it "would be inconsistent with the duties and obligations of loyal American and Canadian citizens, and contrary to the traditional atmosphere of freedom of speech and political action in those countries, for the Russian Church in America to give the pledge of loyalty to a foreign power which is implicit in the demand of the Patriarchal Ukase [of February 16, 1945]" (R. 216).

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* "In the molding of our American civilization, religion has played a decisive part. European immigrants transplanted into American soil their Old World faith and religious institutions. For the most part, the immigrants were a deeply religious people and their churches occupied a central and dominant part of their lives."

Rep. of Sen. Com. on Judiciary pursuant to Sen. Res. 137, 80th Cong. 1st sess., Rep. No. 1515, 81st Cong. 2d sess., April 20, 1950, p. 229.

"* * * In many a Slavic community the church is the greatest single influence in the life of the people, the center of practically all leisure-time activities * * *"

Miller: Peasant Pioneers, p. 139.

The legislature is to be presumed to have known of those demands and those refusals and to have determined that the *Russian Church in America* acted correctly in the matter.

Appellants suggest (brief, p. 33) that the relationship between the Church of Russia and the Soviet state "is a matter of high church policy to be determined by the Chief Authorities of the church and such policy is conclusive upon all the members of the church and upon the civil power in all matters affecting the church and its members" and that the American courts "have no power to pass upon the propriety of the policies or the acts of the Patriarch."

The case cannot be stated so bluntly. Here the autonomous district had been established as a matter of sheer necessity and within the terms and spirit of ukase No. 362. Was it obliged to end its autonomy on the terms demanded by the patriarchate? It will be noted how subtly those terms were phrased: a sobor to be presided over, not by Theophilus, but by the special patriarchal envoy; a pledge of abstention from political activities against the U. S. S. R.; the election of a Metropolitan, Benjamin and the special envoy being recommended by the patriarchate—another slap at Theophilus; the reservation to the patriarchate of the right (*a*) to refuse confirmation of the elected Metropolitan for "any motivated reason whatsoever"—which could easily be political, not canonical or moral—(*b*) to confirm candidates for bishop (*c*) to reward clergy with higher titles, (*d*) to hear appeals as regards bishops, clergy and others (Def. Ex. D).

Such reserved powers would give the patriarchate complete control of the thoughts and speech of the *Russian Church in America.* No clergyman hoping for advancement would dare open his mouth except to echo the propaganda line of the Soviet government. Even the laity would be muzzled.

There is no canonical basis for the demand of "loyalty." Jesus did not call for allegiance to two Caesars. If the Soviet government will not permit the patriarchate to grant full and unconditional autonomy to the *Russian Church in America,* such as was suggested by Professors Fedotoff, Karpovich, Timasheef and others (R. 246), the present status—unhappy as it is—must continue.

It is difficult to conceive that the patriarchate's refusal of such full autonomy is prompted by any but political reasons. Autocephaly—a wider grant than autonomy—was granted to the Church of Georgia by Patriarch Sergius in 1943 (R. 246-247). That is a body doubtless much larger than the *Russian Church in America.** Why did the patriarchate release all rights, even those of a spiritual or symbolic character, over the great Church of Georgia and yet insist on retaining administrative control over a few hundred parishes in America? The answer is obvious: The Kremlin is in a position to suppress criticism in the Church of Georgia without the aid of the Moscow patriarchate; not so in the American parishes.

> "Lenin in 1920 made the definitive statement of autocratic government. 'Why', he asked, 'should a government which is doing what it believes to be right allow itself to be criticized? It would not allow opposition by lethal weapons, and *ideas are much more fatal than guns.*'"
>
> 16 Encyc. Brittan., 1951, p. 356.

The members of the *Russian Church in America* have acted correctly in clinging to their liberties of thought, speech and discussion.

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* As of July 1, 1941, the estimated population of the Georgian republic was 3,722,252 of which 67.7% was of Georgian origin (*USSR: A Concise Handbook*, Cornell Univ. Press, 1947, pp. 6-7).

They have not forfeited their traditional shrines or other temporalities. They are still the beneficiaries of the properties originally dedicated to their use.

C. The legislature is to be presumed to have found upon sufficient evidence that there would be a diversion from the original trust purposes if it were held that only those worshippers who accepted the administrative control of the patriarchate were entitled to enjoy the properties which were dedicated to the use of the diocese prior to April 2-4, 1924.

If appellants' arguments are correct, not only the cathedral, but all properties which were dedicated to the use of the old diocese or any component unit prior to the Detroit sobor, have been forfeited by the members of the *Russian Church in America* and must be administered by the patriarchal authorities for the benefit of the members of the new patriarchal diocese. That diocese was organized by Metropolitan Benjamin who, according to the ukase of June 29, 1934, reported "that our North American Diocese has begun official existence" (R. 225), "a significant admission"; comments Judge Conway, "that the former North America Diocese, which had by that time become a metropolitan district [*Russian Church in America*], had achieved practical administrative autonomy and that it was necessary for the Russian church to organize a new diocese" (R. 265). A similar admission that two separate bodies existed appears in the ukase of February 14, 1945, where reference is made to "the present exarchate headed by Metropolitan Benjamin" and "the Metropolitan District, headed by Metropolitan Theophilus" (R. 227).

The original trust purpose, to which the properties of the old diocese were dedicated, was worship and connected use according to the faith, dogma, canons, discipline, rules and usages of the Russian branch of the Eastern Confes-

sion. It is true that under the rules in force prior to the Great Sobor of 1917-1918 the Czarist government had much to say in church affairs. But the Czar was a believer and the protector of the Church; the Church was established; the Church and the State were allies. The Soviet government is the avowed enemy of the Church; it is officially atheistic; it plays a cat and mouse game with the Church, sometimes persecuting it and sometimes tolerating it (Timasheef: Religion in Soviet Russia).

In a conversation with members of an American trade union delegation, Stalin said:

> "We conduct propaganda and shall conduct propaganda against religious prejudices. * * * The Party cannot be neutral with regard to religion, and it conducts antireligious propaganda against and all religious prejudices because it stands for science, while religious prejudices go against science, since every religion is something contrary to science. * * * * * * The Party cannot be neutral with regard to the bearers of religious prejudices, with regard to the reactionary clergy, poisoning the minds of the toiling masses. Have we oppressed the reactionary clergy? Yes, we have oppressed them. The trouble is only that they are not yet fully liquidated * * * (Pl. Ex. 15-B: statement, pr. R. 208, off. R. 85-86).

This statement reflected the position of the Soviet government in 1927 (R. 85-86).

Appellants, in Appendix B to their brief, print some extracts from writers to the effect that after 1938 the policy of the government changed. It is common knowledge that when Hitler attacked Russia the Soviet leaders, as a war measure, stopped the anti-religious propaganda and somewhat enlarged the privileges of the Church. But, as evidenced by the news article already quoted (*supra*, p. 45),

the pendulum is beginning to swing the other way again. The essential point has been well expressed by Mr. Justice Van Voorhis in the dissenting opinion in the Appellate Division (Jurisdictional Statement, p. 110):

> "Even the intellectual and spiritual ties by which men are held together, are so controlled by the totalitarian state as ultimately to disintegrate all autonomous groups outside of the state itself, or the single political party that rules it. That technique is applied to scientific and cultural as well as to religious groups, so that ultimately no autonomous group with any independence remains. In the final analysis, the state and the state alone becomes all. * * *"

The patriarchate is completely within the power of the government and must carry out its every wish. Today the patriarchate is being utilized as an instrument of propaganda; tomorrow it may be deprived of any means of expression.

Under these circumstances, and in the light of what has happened since the Bolshevik Revolution, a legislative finding that it would be a diversion from the original trust purpose to award the properties to the new patriarchal diocese is reasonable and is to be presumed. Conversely, the legislature is to be presumed to have found that to permit the *Russian Church in America* to remain in enjoyment of the properties is in accord with the terms of the original trust.

As concerns the Cathedral it has already been shown (*supra*, p. 57) that the terms of the trust were fixed by the legislature in appellee's charter, which clearly indicates the *Russian Church in America* as the beneficiary. No exception has ever been taken to these terms which were enacted over 25 years ago.

But if it is considered that the terms of the trust were fixed in the charter of St. Nicholas' Corporation, the result

is the same. The original beneficiaries were the members of that corporation viz. the worshippers at the parish church. Subsequently the membership of the corporation was enlarged to include all of the worshippers in the diocese. The trustees of the corporation were required to administer its property in accordance with the rules of the "ecclesiastical governing body" to which the corporation was subject (Rel. Corps. L. §5). Under those rules the property was to be administered for the benefit of the members of the old diocese. As in the case of the properties of the old diocese generally, it would be a diversion to award the Cathedral to the members of the new patriarchal diocese and, conversely, to hold that the members of the *Russian Church in America* are entitled to the enjoyment of the Cathedral—which is the holding below—is in accord with the terms of the original trust.

D. Even if it is considered that the terms of the original trusts cannot be carried out, the state has power, in the exercise of the *cy près* prerogative, to decree that the properties dedicated to the use of the diocese prior to April 2-4, 1924, may be enjoyed by the original beneficiaries subject to administrative control by the *Russian Church in America* instead of by the patriarchate.

As the successor to the prerogative of the English crown, the *parens patriae*, the legislature may exercise the *cy près* power in a manner similar to the judicial exercise authorized by statute (Real Property Law §113 subd. 2; Personal Property Law §12, subd. 2; cf. *Mormon Church* v. *United States*, 136 U. S. 1). The original terms of the trusts may be carried out in all except one particular viz. administrative control by the central church authorities in Russia. Literal compliance in that one particular has been rendered impracticable because of political conditions in Russia. The state may determine that the trusts be carried out notwith-

standing (cf. *In re Free Church of St. Barnabas*, 1949, Pa. Com. Pl. Berks, 41 Berks 215; *Will of Lott*, 1927, 193 Wis. 409, 412, 414; *Williams Estate*, 1944, Orphans Ct. Tioga, 52 Pa. D. & C. 107, 111-112). The *cy près* power may be exercised in respect of corporate assets as well as technical trusts (*Sherman* v. *Richmond Hose Co.* No. 2, 1921, 230 N. Y. 462).

E. The determination of the legislature that the governing authorities of the *Russian Church in America* are the trustees who may be relied upon to carry out more effectively and faithfully the purposes of the religious trusts created for the benefit of the diocese prior to April 2-4, 1924, is supported by sufficient evidence and is reasonable.

Once it is granted that, as has been shown in the foregoing discussion under this Point I, (*a*) that the members of the *Russian Church in America* are still the beneficiaries of the religious trusts created for the benefit of the members of the old diocese and (*b*) that such determination is either a compliance with the original trust purposes or a reasonable exercise of the *cy près* prerogative, it naturally follows (c) that the governing authorities of the *Russian Church in America* are the proper trustees. Otherwise it would be necessary to hold either that the proper beneficiaries must accept administrative control by the patriarchate, involving the abridgement of freedom of public speech and discussion above indicated or, in the alternative, that they must forfeit their interest in the properties.

No attempt will be made to lock horns with appellants over the issue as to whether the patriarchate is "free", or as to whether the legislature is to be presumed to have made a finding on the issue. Certainly, as has been shown (*supra*, p. 62), Metropolitan Benjamin's own testimony is conclusive proof that the patriarchate would require those people in America who accepted its jurisdiction to

refrain from public criticism of the Soviet regime. Also, the partriarchal ukase of February 16, 1945 (Def. Ex. D), not only confirms Benjamin's testimony but shows that the patriarchate insists on so close a relationship that all church people under its administrative control would be completely at its mercy. The priest or lay leader who criticized the Politburo would be disciplined; the eulogist of Stalin would be rewarded. And now that the patriarchate is frankly permitting itself to be utilized as an instrument of Soviet propaganda (Appendix C, *infra*, p. 118), it is not difficult to surmise that attempts would be made to utilize the American parishes in the patriarchal jurisdiction for similar purposes. Appellants will doubtless object in their reply brief to the use of the material contained in Appendix C—as they object in their main brief (p. 35) to the quotations by Judge Conway from the writings of Anne O'Hare McCormick and Walter Bedell Smith (R. 283-284, fn. 17)—on the ground that this material could not have come to the attention of the legislature since it had not been published when Article 5-C was enacted. The thought that the Bolshevik masters of Russia operated a world-wide apparatus of propaganda can hardly be said to have been a novel one in 1945 and may have occurred to the legislature even—to use the appellants' words (brief, p. 35)—"in the climate of opinion of 1945". Suffice on that subject to point out that as early as 1924 Mr. Justice Ford had said (*supra*, p. 25): "* * * The property used by the Russian Church [in the United States] totals in value an immense sum. If the Soviet authorities can gain control of all these, what a base for their revolutionary propaganda they will have secured." That decision is to be presumed to have been within the knowledge of the legislature. If this Court is asked to perform the "delicate judicial task" of

passing on the validity of Article 5-C and it is claimed in defense of the statute that one of the underlying grounds is a legislative finding that the governing authorities of the *Russian Church in America* may be relied upon to carry out more effectively and faithfully the purposes of the religious trusts involved, because of the likelihood that the patriarchate would be utilized as an instrument of Soviet propagarda in this country, then, it is submitted the attention of the Court may properly be called to conclusive evidence of the fact that the patriarchate is being utilized as an instrument of propaganda, having world-wide dissemination, even although that evidence has come into existence since the judgment appealed from (cf. dissent of Brandeis, J., in *Burns Baking Co.* v. *Bryan*, 1924, 264 U. S. 533).

Appellants argue (brief, p. 27, fn. 19) that appellee did not raise the issue of the relationship between the patriarchate and the Soviet government at the trial. As to this it may be observed, in the first place, that no question as to the constitutionality of Article 5-C was raised at the trial by the appellants. Their first mention of that question was in the brief submitted to the trial judge after the end of the trial. Secondly, the record shows that the status of the Church of Russia under the Soviet regime was gone into at the trial and the appellants had, and availed themselves of, the opportunity to introduce evidence to meet appellee's theory which, in substance, was that political conditions in Russia should be taken into account in passing on the construction of Article 5-C. When Prof. Fedotov was asked to "describe the relations between the Russian Orthodox Church and the Government in Russia" starting with the Bolshevik Revolution, appellee's counsel indicated that the testimony was offered in support of the legality of

the autonomy of the *Russian Church in America* (R. 44). After referring to the birth of the Episcopal Church at the time of the American Revolution, he then said (R. 45):

> "* * * we think that those close, minute, administrative regulations that were enacted by the 1917-1918 Sobor [in Moscow] *under the present political conditions in Russia and the political conditions that have existed ever since the Revolution, and particularly with tension that exists at this very moment between the two countries,* are not appropriate and will not be enforced by any country."

Appellants' counsel then began to state the facts in *Watson* v. *Jones*, 1871, 13 Wall. 679, and was interrupted by appellee's counsel who said (R. 45):

> "* * * I will concede that in the case of a denomination having what is called and episcopal or synodal form of government that the lower units, such as the parishes, are bound by the discipline, rules, usages and decisions of the higher judicatory. No church lawyer can dispute that. I say that does not apply in this case. In the first place they have had no tribunals. There have been no adjudications before a tribunal. We are going to show that later. In the second place, *the political conditions under different forms of government require a modification of that doctrine.*"

Appellants' counsel picked up the gauntlet and at the outset of his cross examination made Prof. Fedotov admit that the Church under the Czarist government was "not free in her social and political activity" and in politics was an aid and instrument of Czarist policy (R. 87-88). In the course of the cross examination, counsel said (R. 92):

> "Q. And you understand that your testimony is being used as a foundation for the argument that

because of alleged conditions in Russia, the group of churches in the United States could declare themselves autonomous or independent?"

At a later stage of the cross examination Prof. Fedotov interpreted the 1920 ukase (Pl. Ex. 5) as referring to "a juridical, social, political and moral break," and "not only the postal break", in communications between the central church authorities and the bishops outside of Russia (R. 139-141).

The argument in the trial court was that political conditions in Russia created a *moral* break in communications which made the ukase of 1920 operative, therefore under *Watson* v. *Jones* the supreme judicatory was the American sobor. The decision appealed from reaches the same result, and also, without regard to the ukase, holds that political conditions in Russia have disqualified the Moscow hierarchy from functioning as the supreme judicatory. Under either form of argument the political conditions are relevant to the constitutional question raised on this appeal. Had the argument been expressed at Trial Term in the terms of the decision appealed from, appellants would not have presented different proof to meet it. Appellee's position on this question was disclosed at the trial, appellants put in proof to meet it and cannot complain if the Court of Appeals rested its decision on a presumed legislative finding as to the relationship between the Church of Russia and the Soviet government.

The evidence which appellants did introduce as to the status of the Church in Russia does not contradict the presumed legislative finding that the patriarchate is an instrument of Soviet propaganda.

(1) A book called "The Truth About Religion in Russia" was compiled by the patriarchate and is accepted

as an official publication of that organ (R. 102). The book asserts that the Patriarchal Church in Russia is free from restraint by the Soviet government and is at liberty to carry on its work without molestation by the Soviet authorities (R. 104).

(2) Metropolitan Gregory testified that the Patriarchal Church functioned effectively and without restraint and is functioning freely as an Orthodox Church, without interference by the civil authorities, and the political views held by the authorities, and any atheistic sentiment that they may have in no way interferes with the unhampered activities of the Church (R. 167).

Both of these statements, the one from the book and that of the witness, might be literally true and still the Patriarch and his synod be mouthpieces of the Kremlin.

Let it be assumed that, as reported in The New York Times of April 2, 1948 (*supra*, p. 45), "the top hierarchy of the Russian Orthodox Church * * * is completely and officially in sympathy with the Communist Government." Then when its official publications, as reported in the same article, and quoted in Appendix C (*infra*, p. 118), engage "in heated attacks on the Western powers," the hierarchy is simply expressing its feeling of "sympathy"; it is not suffering "restraint", "molestation" or "interference".

So, again, the Church might be functioning "freely" in Russia, even although it had been deprived of substantial means, its clergy reduced in social position, its authority to teach religion to children restricted and its organizational type changed from associated to congregational (Timasheef: Religion in Soviet Russia, pp. 24-28; 38-45; 49-53; 131; Gsovski: Legal Status of the Church in Soviet Russia, 8 Fordham L. Rev. 1 *et seq.*). In other words, it might be "freely" exercising the narrowly curtailed functions which it was permitted to retain.

But appellants offered no proof to the effect that the Patriarch and the members of his synod were not completely *controlled* by the government. Churches might be open for worship, parish priests might be conducting services, even seminaries and academies might be educating candidates for the ministry, and still the top hierarchy might be only a mouthpiece of the Soviet government.

The legislature may not have taken the Soviet brand of religious "freedom" at its face value.

> "* * * The prosecution of Christianity in Russia in the years following the revolution was communism at its most honest. The later 'freedom' of religion—**with its back broken**—was communism at its most deceitful." (Editorial in Wall St. Journal, Feb. 14, 1949).
>
> "* * * The church has again an official place in the Soviet Union, but as an agency of the state; on the same terms the religious leaders being imprisoned and executed as 'traitors' in the countries under Soviet control would be tolerated. When Caesar is also God there can be no divided tribute." (Anne O'Hare McCormick, The New York Times, April 8, 1950).

Appellants advert (brief, p. 28) to the resolution of the *Russian Church in America,* in convention assembled at Cleveland in 1946, requesting Patriarch Alexy "to continue us in the his fold and be our spiritual head" on terms of autonomy as contradicting the presumed legislative finding as to the status of the patriarchate. Appellants' argument fails to distinguish between the *spiritual* and *administrative* qualities of the office of Patriarch.

The name *Patriarch of Moscow and All Russia,* to a member of the *Russian Church in America,* stirs sentiments of pride and reverence, quite apart from his estimation of

the particular incumbent. He is required, in his liturgical worship, to pray for the head of the Church, as well as for all of the other Patriarchs of the East and other hierarchs. The Court may note that when the witness Fedotov testified under cross-examination that the official book "The Truth About Religion in Russia" was "untruth" and was asked

> "Q. You say the Patriarch of Moscow published untruths, is that it?"

he replied

> "A. It is against my feeling, but I must" (R. 102).

This feeling of reverence for the spiritual office is shown throughout the record. The *Russian Church in America* never broke off spiritual communion with the Patriarch; it was the Patriarchate that laid an interdict on the Church.

But at the same time the Church has always safeguarded its *administrative* independence. It has insisted on the right of self government.

The gist of the matter is this: that in his *spiritual* quality the Patriarch continues as head of the Church of Russia, of which the autonomous metropolitan district considers itself a part, but as *administrative* head he is disqualified so long as he permits himself to be utilized as an instrument of Soviet propaganda.

Parenthetically, he has also lost his function as administrative head of the Church in Russia, for that body has become of the congregational type by force of Russian civil law (*supra*, p. 34).

Appellants misconstrue the position of the *Russian Church in America* in regard to the Patriarch and his synod. To treat Alexy as a "holy man" because he is occupying

an office of great symbolical value does not disentitle the American parishes from refusing to accept him and his synod as a supreme administrative organ. The King of England is accepted by the members of the Commonwealth as a symbolical, not administrative, head.

Finally, on the question of the status of the Church in Russia, this Court, like the Court of Appeals and the legislature, is possessed of facts of common knowledge. "Judges are not necessarily to be ignorant in Court of what everybody else, and they themselves out of Court, are familiar with; nor was that unreal ignorance considered to be an attribute of the Bench in early and strict times" (*Lumley* v. *Gye*, 1853, Q.B., 2 El. & Bl. 216, 267, quoted in 9 Wigmore on Evidence, 3d ed., §2583n).

In the present case it is particularly appropriate that the Court take notice of facts which it would be practically impossible for appellee to prove in the ordinary manner. One can imagine the success with which appellee would meet if it attempted to take proof under letters rogatory to a Russian court as to the utilization by the government of the patriarchate as an instrument of propaganda! As Mr. Justice Van Voorhis said (Jurisdictional Statement, p. 111):

> "When the case of *Kedrovsky* v. *Rojdesvensky* was in the courts, it evidently did not suit the purposes of the ruling power in Russia to furnish evidence to establish the lack of canonicity of the group which succeeded in that lawsuit. That circumstance should result in scepticism concerning the present assertion, that since the extinction of the winning faction in that action 'the Patriarchal Church functioned effectively and without restraint.' As stated by Lord Mansfield in *Blatch* v. *Archer* (Cowp. 66): 'It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the

power of one side to have produced and in the power of the other to have contradicted (quoted in II Wigmore on Evidence, section 285). It does not exceed the limits of judicial notice to recognize that in this action defendant Benjamin Fedchenkoff, like Kedrovsky in the prior action, had access in Russia to whatever helpful documentary or other evidence respondents needed, whereas the door to obtaining similar proof in plaintiff's behalf was undoubtedly closed, as it was to Archbishop Platon in the prior case. Were it to suit the purposes of the ruling caste in Russia at some future some time to disavow the authority of Archbishop Benjamin, there is little doubt that the lack of it could be demonstrated as effectively as has been accomplished in the case of Archbishop Kedrovsky, who appeared to possess the tokens of investiture when he was in court a quarter of a century ago."

F. If the administrative control by the patriarchate of the properties dedicated to the use of the old diocese is based on rules having the force of contract, as pleaded in the amended answer (R. 3), the contract has been rendered impossible of performance on the part of the Church located in Russia because the polity of that part of the Church, by force of the civil law, has become congregational.

The governmental decree referred to is that of October 1, 1929 (*supra*, p. 34). On the status of the higher church authorities Dr. Gsovski says:

"It is true that the statutory law states that 'religious associations may organize local, All-Russian, or All-Union conventions and conferences', but it is only allowed 'by special permission issued for each case separately' by the soviet authorities. Again, such conventions and the executive bodies elected by them have fewer rights than the local religious associations * * * It is especially emphasized that *their decisions and decrees cannot be enforced and are*

subject to the good will of the members of the congregation. Ecclesiastical authorities have in the eyes of soviet law no jurisdiction over the parishes with regard to religious properties • • • Thus whenever the soviet law uses the term 'religious association' only the isolated parishes are meant. *Only a separate parish has some kind of status in Soviet Russia.* • • •"

The Legal Status of the Church in Soviet Russia, 8 Fordham L. Rev., 9.

The trial court's attention was called specifically to the governmental decree before mentioned and its text was read into the record (R. 58-59). No proof to the contrary was offered. It must, therefore, be presumed that the Church of Russia, at any rate within the territorial limits of Russia, is congregational in polity by virtue of Soviet law. Since unquestionably the most numerous portion of the Russian Church is located in the Republic of Russia it is obvious that the contract pleaded by Metropolitan Benjamin in his amended answer has been rendered impossible of performance. The patriarchate cannot claim that the Russian Church is a world-wide religious association, of the associated or connectional type, if the preponderant majority of the members, under the civil law of their place of residence, are entitled to insist on a congregational polity.

This change in the polity of the Church of Russia located in the Russian Republic is an additional reasonable basis for the legislation here in question.

POINT II.

Neither the granting of a charter to a religious corporation nor the regulation, within reasonable limits, by the state of the conditions upon which the corporate property is to be held and administered, violates the principle of the separation of Church and State.

A. A state may validly grant a charter to a religious corporation.

Conceivably the principle might have originally been pushed so far as to forbid the creation of religious corporations. Indeed this was what actually happened in Virginia, the birthplace of the First Amendment. Consequently even today a religious corporation cannot be formed under the laws of Virginia, but the constitution and statutes provide for religious trusts (Va. Const., 1902, art. 59; Va. Code 1950, tit. 57, art. 2).* A similar situation exists in West Virginia (W. Va. Const., 1872, art. VI, sec. 47; W. Va. Code of 1949 §§ 3488 *et seq.*)

At an early date, however, this Court came to the conclusion that

> "the free exercise of religion cannot be justly deemed to be restrained by aiding with equal attention the votaries of every sect to perform their own religious duties, or by establishing funds for the support of ministers, for public charities, for the endowment of churches, or for the sepulture of the dead. And that these purposes could be better secured and cherished by corporate powers, cannot be doubted by any person who has attended to the difficulties which surround all voluntary associations. While, therefore, the legislature might exempt the citizens from a compulsive attendance and payment of taxes in support of any particular sect, it is not perceived that

* Agencies of religious bodies may be incorporated (cf. *Jordan v. Richmond Home*, 1907, 106 Va. 710, 717-718).

> either public or constitutional principles required the abolition of all religious corporations."

Terrett v. *Taylor*, 1815, 9 Cranch 43, 49, per Story, J.

In that case the Bill of Rights of Virginia had declared that "all men are equally entitled to the free exercise of religion according to the dictates of conscience" yet Mr. Justice Story said (at p. 49):

> "* * * it is difficult to perceive how it follows, as a consequence, that the legislature may not enact laws more effectually to enable all sects to accomplish the great objects of religion by giving them corporate rights for the management of their property, and the regulation of their temporal as well as spiritual concerns. * * *"

In the footnote below* will be found references to the statutory provisions for incorporation of religious corporations under the laws of the various states and territories.

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* *Alabama* Code 1940, tit. 10, art. 3; *Alaska* Comp. L. 1949, §§36-4-1 *et seq.*; *Arizona* Code, Cum. Supp. 1949, §§53-401 *et seq.*; *Arkansas* Stat. 1947 sec. 64-1301 ("benevolent" purposes construed to include religious according to information received from office of Secretary of State); *California* Corps. Code §§9200 *et seq.* as amend. 1949 c. 1391; *Colorado* 1935 Stats. c. 41 art. 14; *Connecticut* Gen. Stat. 1949 c. 257; *Delaware* Rev. Code 1935 c. 68; *Florida* Stat. c. 617; *Georgia* Code tit. 22, c. 22-4; *Hawaii* Rev. L. 1945 tit. 21 sec. 8311; *Idaho* Code c. 11; *Illinois* Rev. Stat. 1951 c. 32 §§164 *et seq.*; *Indiana* Stat. §§25-1527 *et seq.*; *Iowa* Code tit. 19 c. 504; *Kansas* Gen. Stat. 1949 §§17-1701 *et seq.*; *Kentucky* Rev. St. 1948 §§273.010 *et seq.*; *Louisiana* Rev. Stat. 1950 §12-111; *Maine* Rev. Stat. c. 53 §§1 *et seq.*; *Maryland* Code, 1947 Cum. Supp. art. 23 §§275 *et seq.*; *Massachusetts* L. tit. XI c. 67; *Michigan* Comp. L. 1948 §§450.178 *et seq.*; *Minnesota* Stat. c. 315; *Mississippi* Code 1942 §§5350 *et seq.*; *Missouri* Rev. Stat. art. 10 §5439; *Montana* Rev. Codes 1947 c. 14; *Nebraska* Rev. Stat. Supp. 1949 c. 21 art. 8; *Nevada* Comp. L. 1929 §§3215 *et seq.*; as amend. Stats. 1941, 398; *New Hampshire* Rev. L. tit. 24 c. 272; *New Jersey* Stat. tit. 16 (c. 15-A similar to New York statute here involved, as originally enacted); *New Mexico* Stat. 1941 §§54-1306 *et seq.*; *New York* McKinney's Cons. L. v. 50; *North Carolina* Gen. Stat. §§55-1 *et seq.*; *North Dakota* Rev. Code 1943

New York has from an early date been liberal in granting charters for religious corporations both by special act and under general statutes (cf. L. 1784, c. 18; L. 1813, c. 60; L. 1822, c. 187; L. 1863, c. 45; L. 1867, c. 265; L. 1873, c. 633, L. 1886, c. 16). The Religious Corporations Law provides for incorporation of religious corporations connected with over thirty of the principal denominations or independent.

The legislature has not hesitated to concern itself with minute details of church government, such as that the annual elections of an incorporated Episcopal parish, if no date therefor be fixed by law, shall be held on the Monday next after the first Sunday in Advent or on the Tuesday next after the second Sunday in January as may be determined by vote of the vestry (Rel. Corps. L. §43). And in the middle of the last century the legislature was the center of a heated controversy, widely debated and publicised, over the proposed repeal of an act limiting the electoral franchise in Trinity Parish to its own communicants rather than, as originally, all Episcopal communicants of the City of New York (Trinity Church Pamphlets).

After the union of the Methodist Episcopal Church, the Methodist Protestant Church, and the Methodist Episcopal South Church to form The Methodist Church, the legislature enacted that all religious corporations connected with the three merging bodies should eliminate from their respec-

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c. 10-08; *Ohio* Page's Gen. Code tit. 9 §§8623-97 art. div. 6 c. 4, *Oklahoma* Stat. 1951 tit. 18 c. 14; *Oregon* Comp. L. tit 77 c. 4 art. 2; *Pennsylvania* Purdon's Stat. tit. 15 c. 49 A art 2 sec. §2851-214; *Rhode Island* Gen. L. 1938 tit. 15 c. 16 art. 3; *South Carolina* Civil Code tit. 38 c. 158 art. 3; *South Dakota* Code 1939 c. 11.15; *Tennessee* Michie's Code 1938 §§4146 *et seq.*; *Texas* Vernon's Rev. Civ. Stat. 1925 art. 1396 *et seq.*; *Vermont* Stat. Rev. 1947 §6022; *Washington* Remington's Rev. Stat. §§3863 *et seq.*; *Wisconsin* Stat. 1949 c. 187; *Wyoming* Comp. Stat. 1945 c. 44 art. 7, Cum. Supp. c. 44, art. 10.

tive names the words "Episcopal", "Protestant" or "South", as the case might be (Rel. Corps. L. §321, subd. 1).

The constitutionality of legislative provisions such as these has not been challenged. It appears to have been taken for granted over a long period of years that the state is not intruding into a forbidden field when it grants the corporate franchise to religious corporations and attaches conditions either in the original charter or by subsequent amendment, at least within reasonable limits. An example of such amendment is that of the charters of religious corporations of the Eastern Confession incorporated under the Religious Corporations Law. Originally that law provided that the trustees of such corporations should be the Envoy Extraordinary and Minister Plenipotentiary and Consul General of Russia to the United States ex officio.* For obvious reasons this provision had to be amended, so that the law now provides for trustees to be selected according to the by-laws of the particular church or the rules and usages of the denomination to which that church belongs (Rel. Corps. L. §96). Of course amendments in respect of non-controversial details such as have been mentioned are not likely to lead to the raising of constitutional issues. These examples do, however, illustrate the point that once it is conceded—as it must be—that a state may validly incorporate a religious corporation, so far as the First and Fourteenth Amendments are concerned, then the state may be called on from time to time to regulate or supervise the exercise of the corporate franchise. Such state action may be through either the legislature or the courts. The question is: what are the limits of such action under the First and Fourteenth Amendments?

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* L. 1871, c. 12, §1, later Rel. Corps. L. of 1895, §91, Rel. Corps. L. of 1909, §91.

B. In granting the corporate franchise to a religious society a state may validly provide for or against denominational control.

Under the early statutes of New York providing for the incorporation of religious societies it was held that religious corporations were free from denominational control (*Robertson* v. *Bullions*, 1854, 11 N. Y. 243; *Baptist Church* v. *Witherell*, 1832, 3 Paige 296; *Bellfort* v. *Tooker*, 1859, 29 Barb. 256, aff. *sub. nom. Petty* v. *Tooker*, 1860, 21 N. Y. 267). In 1875 the legislature imposed denominational control on all religious corporations (L. 1875, c. 97, §4, now Rel. Corps. L. §5). The same result has been reached in most jurisdictions by judicial decision following *Watson* v. *Jones*, 13 Wall. 679. The rule of denominational control, it is submitted, is not imbedded in the federal constitution. Whether the property of religious corporations is to be administered subject only to the laws of the state and by-laws of the corporation or also subject to the rules of the denomination with which the corporation is connected, is a question of state policy which may be determined by the legislature free of restraint under the First Amendment as read into the Fourteenth. It would seem that whether the state provides for or against denominational control of religious corporations freedom of religion is not abridged. If under the law of the state a religious corporation is free from denominational control and administers its property in violation of the rules of the denomination the spiritual society with which the corporation is interrelated may be disciplined by the governing organs of the denomination (*Robertson* v. *Bullions*, 11 N. Y. at p. 264).

If the foregoing reasoning is correct it was competent for the legislature to abrogate the rule of denominational control to the extent reflected in Article 5-C.

C. The modification of the rule of denominational control effected by the enactment of Article 5-C was reasonable under the circumstances.

On the whole the rule of denominational control has worked well and is in the public interest. But it does not fit all cases *e.g.* the unique situation presented here by the justifiable break in administrative ties between the old diocese and the patriarchate, the unjustifiable demands for "loyalty" to the Soviet regime and the utilization of the patriarchate as an instrument of Soviet propaganda. Under these circumstances it was reasonable, and therefore competent, for the legislature in the public interest to prescribe that the denominational control of the religious corporations to which Article 5-C was made applicable should be exercised by the *Russian Church in America*.* So far as existing corporations were affected the enactment was an amendment of their corporate charters all of which had been granted subject to the reserve power (N. Y. Const. Art. X, sec. 1).

D. Even if it is held that the rule of denominational control is imbedded in the federal constitution a state may validly inquire into and pass on the competence under their own rules of the denominational organs attempting to exercise such control.

The validity of such investigation and determination, when made by the judicial arm of the state government, will first be considered.

Watson v. *Jones* is usually cited for the rule that the civil courts accept as conclusive the adjudications of church tribunals on ecclesiastical questions, including even the

* For an example of denominational control of a parish corporation by the *Russian Church in America* being enforced by a civil court, see *Russian-Serbian Holy Trinity Orthodox Church* v. *Kulik*, 1938, 202 Minn. 560.

question of the tribunal's jurisdiction. However, the courts have had to recognize some qualifications of the broad expressions used in *Watson* v. *Jones*.

> "We think it doubtful whether the Supreme Court [in *Watson* v. *Jones*] intended to announce a principle without limitation or exception. It seems probable that when the occasion arises it will align itself with the courts which have limited the application of its announced principle. See 24 L. R. A., N. S., 698."
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> *Reformed Bethanien Church* v. *Ochsner*, 1948, 72 So. Dak. 150, 165.

> "• • • it may well be that the civil courts will interfere in a case where it is shown that the controlling authority of a general church has indisputably abandoned fundamental and characteristic doctrines and belief to the diversion of church property from the objects and purposes of the implied trust to which it is subject. Mack *v.* Kime, 129 Ga. 1, 58 S. E. 184, 24 L. R. A., N. S., 675; 23 R. C. L. 449."
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> *Trustees of Pencader Presbyterian Church* v. *Gibson*, 1941, 19 Del. Ch. Ap. 375, 391.

For cases where the courts have refused to be bound by the action of church bodies, see

> *Grupe* v. *Rudisill*, 1927, 101 N. J. Eq. 145, 165;
> *Wallace* v. *Trustees of General Assembly*, 1902, 201 Pa. 292;
> *Jennings* v. *Scarborough*, 1894, 56 N. J. L. (27 Vroom) 401.

When it is clear that the ecclesiastical tribunal lacked jurisdiction, its ruling is not binding on the civil court, e. g., if a church court imposed a death sentence for murder (*Watson* v. *Jones*, 13 Wall. at pp. 732-733).

In the case of religious trusts the state law is supreme.

> "* * * the law, whose supremacy, over all ecclesiastical rules and regulations, when rights of property are concerned, is not to be questioned."

Krauczunas v. *Hoban*, 1908, 221 Pa. 213, 225.

In the case last cited a Pennsylvania statute required lay control of church property, although the rules of the Roman Catholic Church required the property to be held by the bishop. The court compelled the bishop to convey the parish property to the congregation. When the bishop sought to evade the effect of this decree by laying an interdict on the congregation, who were thus compelled to use a non-Catholic minister for their services, the court refused to enjoin such use of the property (*Novickas* v. *Krauczunas*, 1913, 240 Pa. 248).

In the present case, in the absence of a statute, the New York courts could validly inquire into the question whether, under the political conditions existing in Russia, the patriarchate was competent to make a decision as to who should administer the American properties.

The rule of *Watson* v. *Jones* has not prevented the civil courts generally from passing on the competence of supreme church judicatories to adjudicate questions of ecclesiastical law or polity. For example, the powers of the supreme organs of the Presbyterian Church U. S. A. and the Cumberland Presbyterian Church under their respective constitutions to take the various proceedings to effect a merger of those two bodies was inquired into and passed on by the courts of several jurisdictions.*

As has been pointed out by a leading writer on the subject, the refusal of the courts to inquire into the com-

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* *Ramsey* v. *Hicks*, 1910, 174 Ind. 428; *Brown* v. *Clark*, 1909, 102 Tex. 323; *Mack* v. *Kime*, 1907, 129 Ga. 1; *Wallace* v. *Hughes*, 1909, 131 Ky. 445; *Permanent Committee* v. *Pacific Synod*, 1909,

petence of church judicatories, in suits involving religious trusts, would subject the beneficiaries to ecclesiastical tyranny (Zollman: American Church Law, 1933, § 53). At any rate it is submitted that the question whether or not in a given case such inquiry is to be made is one of state law and is not affected by the provisions of the federal constitution.

E. By laying down a rule in advance for the guidance of its citizens the legislature promoted public peace and order and discouraged litigation.

The courts of New York, from the time of the Russian Revolution to the date of the enactment of Article 5-C, had been plagued with lawsuits arising out of the situation of the Church of Russia.*

If under the First Amendment as read into the Fourteenth a state through the judicial arm is competent to

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157 Cal. 105; *First Presb. Ch.* v. *First Cumberland Presb. Ch.*, 1910, 245 Ill. 74; *Fancy Prairie Cong.* v. *King*, 1910, ibid. 120; *Pheasant Grove Cong.* v. *Riley*, 1911, 248 id. 604; *Sanders* v. *Baggerly*, 1910, 96 Ark. 117; *Harrison* v. *Cosby*, 1911, 173 Ala. 81; *Morgan* v. *Gabard*, 1912, 176 id. 568; *Carothers* v. *Moseley*, 1911, 99 Miss. 671; *First Presb. Ch.* v. *Cumberland Presb. Ch.*, 1912, 34 Okla. 503; *Hayes* v. *Manning*, 1914, 263 Mo. 1; *Missouri Coll.* v. *Guthrie*, 1914, ibid. 32; *Duvall* v. *Synod*, 1915, 8 circ., 222 Fed. 669, aff'd *sub nom. Shepard* v. *Barkley*, 1918, 247 U. S. 1; upheld the merger. *Landrith* v. *Hudgins*, 1908, 121 Tenn. 556, and *Boyles* v. *Roberts*, 1909, 222 Mo. 613; held the merger invalid.

* E. g. *Nemelovsky* v. *Rykhloff*, 1919, 1st dept., 187 App. Div. 290; *Kedrovsky* v. *Archbishop and Consistory*, 1921, 1st dept., 195 id. 127; *Kedrovsky* v. *Archbishop and Consistory*; *Kedrovsky* v. *Rojdesvensky*, 1924, 214 id. 483; *Kedrovsky* v. *Rojdesvensky*, 1926, 242 N. Y. 547; *Kedrovsky* v. *Archbishop and Consistory*, 1926, 218 App. Div. 121; *Same* v. *Same*, *Appeal of Kryzanovsky*, ibid. 124; Same *v.* Same, *Appeal of Gates, Receiver*, 1927, 220 id. 750; *Kedrovsky* v. *Russian Catholic Church*, 1928, 249 N. Y. 75; *Same* v. *Same*, ibid. 516; *Nikulnikoff* v. *Archbishop and Consistory*, 1932, Sup. Ct. N. Y., 142 Misc. 894; *Waipa* v. *Kushwara*, 1940, 2nd dept., 259 App. Div. 843; *Same* v. *Same*, 1940, 283 N. Y. 780. In addition there were suits in the lower courts (R. 194; also cf. *Kedrovsky* v. *Rojdesvensky*, 1924, App. T. 1st dept., 123 Misc. 159).

investigate facts and make a determination as to the proper administration of a religious trust in case of a particular dispute, the state has like competence through the legislative arm to investigate, make findings of fact and lay down a rule for the administration of a general class of such trusts. *The action of the legislature in so laying down a general rule as a guide to its citizens is no more an intrusion into the forbidden field of religion than the action of the courts in adjudicating the particular disputes which are submitted to them.* If the courts were to refuse to take jurisdiction of the disputes because of a supposed constitutional restraint, the peace and order of the state would be disturbed; possession would be ten points of the law; whoever first barricaded himself in a church building could not be ejected; the administration of religious trusts would be in chaos.

Just as it is necessary, in the interest of public peace and order, for the judiciary to act in particular cases affecting the administration of religious trusts, so it is a reasonable exercise of the police power for the legislature to lay down a rule for a general class of cases.

This is in itself a reasonable basis for the legislation here involved. It would be an unreasonable hardship to require the members of every *Russian Orthodox church* (as that term is defined in §105 of the Act), whenever an attempt was made to seize control of its property in the name of the patriarchate, to dig up and assemble the evidence required to convince the court that the patriarchate was not the proper administrator. The legislature has once and for all made the investigation and determination which will avoid litigation in the future.

Whether the legislature has encroached on the field of the judiciary under the state constitution is not a federal question.

POINT III.

Religious liberty is promoted, not abridged, by the legislation.

If the patriarchate is held to be in perpetual control of the properties which were dedicated to the use of the diocese prior to April 2-4, 1924, and no legislature or court can inquire into the propriety of such control, then truly the great body of worshippers for whose benefit these properties were dedicated are hampered in the exercise of their religion; for they will forfeit their traditional shrines rather than bow their necks to Stalin. Conversely, if it is held that the legislatures and courts may validly protect them in the enjoyment of their accustomed places of worship, their freedom of religion is preserved.

It would amaze Madison and Jefferson to learn that the doctrine of religious liberty was being invoked to help a foreign bishop to seize control of American church property! There was widespread opposition in the colonies, even among Anglicans, to receiving English bishops, on account of their close connection with the English government (1 Stokes: Church and State in the United States, pp. 231-240).

It was the existence of the state controlled churches in Europe and in various colonies that led to the cry for religious freedom. The political independence of America was soon followed by the independence of the American churches.

"From being *appendages of national churches in Europe,* they now become national churches themselves in this new Empire" (from a letter of Rev. Edward Livingston, quoted in Stokes, *op. cit.,* vol. I, p. 720). The Dutch Reformed were connected with the Church in Holland

(Stokes, *op. cit.*, vol. I, pp. 749-752; *cf. Miller* v. *Gable*, 1845, Ct. Ch., 2 Denio 492, 511). Other churches with European connections were the German Reformed (1 Stokes, p. 748), Lutherans (*ibid.*, p. 765), Moravians (*ibid.*, pp. 774-775), as well as, of course, the Episcopalians. All of these became independent after the Revolution.

It is true that the Church of England consecrated bishops for the American Episcopal Church. Even so, if the rule of denominational control had been pushed to the extreme point contended for by appellants here, a single parishioner could have insisted on the continuance of the ancient connection.

> "* * * Public opinion would not have borne it [such a result]. Yet every Episcopal congregation in America had been founded on the basis of that connexion, and our independence in other matters had raised no unanswerable objection to its permanence, especially, after the Bishop of London had procured an act of Parliament to dispense with engagements by the American Episcopal clergy that would have interfered with their political allegiance. It is true that the separation was effected with the assent of the mother church; but it was the parishioner here, and not the church abroad, whose consent was necessary to a dissolution of his ecclesiastical relation, in order to impair his civil rights. Besides, the consent of the mother church was only formal, and given to the separation as to a measure which she could not prevent. She indeed conferred the episcopate, and thus secured a continuance of the apostolic succession to the American Episcopal Church; but that might have been had from the nonjuring bishops in Scotland, as it was by Doctor Seabury, or from the Danish Episcopal church, which indeed offered it on terms of signing the thirty-nine articles of the church of England, with the exception of their political parts.

> Had the offer been accepted, there would have been an adverse withdrawal of ecclesiastical allegiance—in principle the very case before us—and it will not be pretended that the majority of an Episcopal congregation here would not have been at liberty, in that event, to form a connexion with an independent Episcopal church government, without forfeiting the interest of each in the church property."
>
> *Presbyterian Congregation* v. *Johnston*, 1841, 1 W. & S. (Pa.) 9, 39.

In other words, the rule of denominational control is not so inflexible as not to yield to political changes (*cf.* Zollman: American Church Law, rev. ed., 1933, p. 239).

When the framers of the federal or state bills of rights planned for religious liberty in this country it is not likely that they were concerned with preserving the canonical rights of the Bishop of London to exercise administrative control of the Episcopal parishes.

It is conceivable that even the Church of Rome in dire necessity might need legislation of the character here involved to protect its properties here. A Pope, seized and drugged by tools of the Kremlin, might send here an apostolic delegate to demand from the Roman Catholic clergy "loyalty" to the Soviet regime. If under those circumstances the American bishops organized the Roman Catholic Church in the United States, as a temporarily autonomous body, would the legislatures and courts be forbidden to recognize it as the proper administrator of church properties here?

POINT IV.

The religious freedom of Metropolitan Benjamin is not affected by Article 5-C as construed and applied by the Court of Appeals.

He came here in 1933, organized a new patriarchal diocese (*supra*, p. 37) and must have set up its headquarters somewhere. Not until twelve years later did he make a move to gain admittance to the Cathedral. The privilege of presiding there could not have meant so much to him.

The legislation leaves him free to worship or preside in any church or cathedral where he may be welcome. He is even free to *worship* in the Cathedral, since appellee's charter requires that access to the Cathedral for worship shall always be free for all worshippers (R. 170). But he may not *officiate* in the Cathedral unless permitted to do so by appellee or its licensees. Freedom of religion does not mean freedom to deprive other people of their accustomed shrines. If it had not been for the erroneous judgment which forced appellee's licensees out of the Cathedral in 1926 the *Russian Church in America* would have had the enjoyment of the property during all these years and would still be there. Only by reason of the fact that by making some sort of a deal under which, in exchange for ordaining the schismatic John Kedroff, Benjamin got himself into the premises, is he able to say that the judgment appealed from is forcing him out. He had no right to be there in the first place.

If the defeated party in every suit over the administration of property dedicated to religious uses were able to upset the judgment by raising the cry of religious liberty, it would be futile for the courts to entertain such suits.

POINT V.

The Act does not "outlaw" or "suppress" the patriarchate in the state.

The compulsory mandate of the act applies only to religious corporations which fall within the definition of "Russian Orthodox church" contained in §105. A corporation organized as an independent unit, or founded since April 23, 1924, for the purpose of adhering to the patriarchal jurisdiction, is not affected by the mandate. There is no proof that any corporation affected by the act recognizes or is attempting to recognize Benjamin as ruling bishop.

It is nonsensical for appellants to say, as they do on page 22 of their brief, that Article 5-C is "a general statute outlawing a Church in its entirety". The patriarchate is at liberty to come into the state of New York and establish as many parishes or other ecclesiastical organizations as it may see fit. The statute merely prohibits it from seizing control of those properties which were dedicated to the use of the diocese prior to April 24, 1924. A religious corporation owning such property in the state of New York is a "Russian Orthodox church" as defined in §105. There is no proof that any member of a "Russian Orthodox church" as so defined objects to administrative control by the governing authorities of the *Russian Church in America* or desires that the patriarchate have such control. All that appears from the record is that appellee, which is a "Russian Orthodox church" within the definition, was ousted from its property as a result of the erroneous decision in *Kedrovsky* v. *Rojdesvensky* and that Metropolitan Benjamin got himself admitted into occupancy of the property by action of the admittedly wrongful occupant, appellant Kedroff. Two wrongs have been committed, the

ouster of appellee through a miscarriage of justice and the admission of Benjamin by the wrongful occupant. It is extraordinary that the statute and decision which right these two wrongs should be assailed as an abridgment of religious freedom and a violation of the principle of the separation of church and state. If there was such an abridgment and violation it took place in 1926 when the members of the *Russian Church in America* lost the enjoyment of their central place of worship. When Benjamin took over occupancy of the Cathedral in October, 1945, he defied the mandate of the statute.

POINT VI.

The Act does not compel a "transfer" of the Cathedral from one jurisdiction to another.

The Cathedral has always been, whether as parish church, diocesan see or administrative center of the *Russian Church in America,* an integral part of an identical body, whether diocese or autonomous district (regardless of the actual occupancy by the Kedrovsky family, an unfortunate but irrelevant incident). The corporations owning the Cathedral in succession were under the administrative control of the Most Sacred Governing Synod until 1917-1918, the patriarchate until April 2-4, 1924, and the *Russian Church in America* since then to the present. The statute merely determines that the *Russian Church in America* should continue in control of appellee and the judgment merely awards to appellee possession of its own property.

The fact that Benjamin is in actual occupancy is coincidental, but irrelevant. He is not in occupancy by license from the owner, but against its will. Occupancy was wrongfully wrested by John Kedrovsky from the appellee's

licensees, Platon and Turkevich, and wrongfully transmitted through the brothers Kedroff to Benjamin.

Appellants assert (brief p. 23) that a "statute that commands that a *church* 'shall recognize and be and remain subject to the jurisdiction and authority' of one church instead of another, of one archbishop instead of another, is unconstitutional on its face." The use of the word "church," as first appearing in the foregoing sentence, is disingenuous. The reference is to §107 (1). The "church" commanded by the statute is a religious corporation, not a spiritual body. The command is that a religious corporation which falls within the definition of *Russian Orthodox Church* in § 105 i.e. founded and established for the purpose and with the intent of adhering to and being subject to the administrative jurisdiction of the old mission or diocese before April 2-4, 1924, or the *Russian Church in America* since that date, shall recognize and be and remain subject to the jurisdiction of the governing authorities of the *Russian Church in America*. This is simply an elaboration of the command contained in §5 subjecting every religious corporation to denominational control. Appellants do not and cannot question the validity of that section but it also is in effect a command to a "church" (religious corporation) to recognize the authority of another "church". (ecclesiastical governing body of connectional denomination). §107 elaborates §5 by identifying the governing authorities to which the *Russian Orthodox churches*, as defined, shall be subject. If appellants' assertion were correct, no legislature and no court could command a religious corporation to be subject to a denominational authority; in other words, all church property would be administered subject to a congregational polity. This is hardly the result which appellants are seeking.

Appellants assert (brief, p. 23):

> "A statute that says that 'every' Russian Church and all its properties 'shall be and remain subject to the jurisdiction' of the metropolitan district and its elected archbishop, dispossesses the Patriarchal Church from all its properties, prevents any of its churches from existing in this state, and prohibits the free exercise of 'religion by that church.'".

As has already been pointed out, there is no proof of the existence in this state of any *Russian Orthodox church*, as defined, which now recognizes, or desires to recognize, the administrative jurisdiction of the patriarchate. There is no proof that any "Patriarchal Church" to which the statute would apply, exists in the state. Appellee is certainly not a "Patriarchal Church." The patriarchate has no properties from which it is dispossessed by the statute and has no churches which the statute prevents from existing. The paragraph last quoted from appellants' brief misconstrues the statute and assumes a state of facts not proven.

The next sentence, asserting that the statute prohibits the exercise of their religion by the "Patriarchal Churches" and compels them to accept the jurisdiction of a rival church, is equally senseless since no "Patriarchal Church" subject to the statute has been shown to exist.

Here a word may be said as to Article XV and §15 (3) of the Religious Corporation Law, providing for the Federated Orthodox Greek Catholic Primary Jurisdictions in America. Appellants say that the legislature selected the Patriarchal Church as one of the four "primary Orthodox jurisdictions in the state of New York" (brief, p. 35). What actually happened was that the heads of the Greek and Syrian jurisdictions here invited Metropolitan Benjamin to join them in forming an organization designed to bring together all of the Eastern Christians in a

federation. It was hoped at the time, 1943, that the breach between the patriarchate and the *Russian Church in America* would be healed. The writer of the letter quoted in the footnote* is an attorney in Buffalo who drafted the

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*FEDERATED ORTHODOX GREEK CATHOLIC
PRIMARY JURISDICTIONS IN AMERICA
(The Eastern Orthodox Church)

Office of the Chancellor
1064 Ellicott Square
Buffalo, N. Y.

Office of the Secretariat
10 East 79th Street
New York, N. Y.

January 16, 1948

Mr. Ralph Montgomery Arkush
General Counsel, Russian Orthodox
Greek Catholic Church of North America
15 Broad Street
New York, New York

My dear Ralph:

Having in mind our many conferences but particularly the one of day before yesterday on the subject of the Orthodox Church, I am sure that your struggle and mine are *One*, namely, *Unity* of *Orthodoxy*. We agree that its influence and longevity in America can only be expanded through Unity.

* * * * * *

There is only one way to begin this tremendous task: *Put the Federation in motion immediately. Reorganize it.* Then launch a joint campaign to raise funds. Erect a Federated, large-scale Institute of Theology and Learning. Let the English be its predominant language and, optionally, provide Chairs or Departments for Slavic, Syrian, Rumanian and Greek language training. This will enable the Clergy to read prayers in any language and celebrate Liturgy in any congregation. Thus the communicants, congregating, particularly in small cities, will consolidate their material means, concentrate their activities, rebuild and modernize their places of worship and make them attractive for the youngsters.

* * * * * *

In the name of Orthodoxy, which is holy to us, please, bear in mind: *The Federation cannot go forward without your Jurisdiction.* Orthodoxy cannot go forward without unification. Both are stopped at the track because of the unfortunate complications in your Jurisdiction. But both you and His Eminence Metropolitan Theophilus have expressed the desire to join the Federation. The sole obstacle was, and still is, your relations with Moscow. It is most unfortunate that the rift has not been bridged. To wait for bridging it, many years may pass. Meanwhile, prospects will disappear. These are the formative and most promising years. Failure to undertake big projects within their span may be fatal to the whole plan.

Therefore, personally and on behalf of millions who feel as I do, I urge you and His Eminence Metropolitan Theophilus that instead

legislation. It is generally admitted that without the adherence of the *Russian Church in America* the organization is practically a dead letter.

A word may also be said as to Governor Dewey. His salutation of Benjamin in a speech at Buffalo in 1943 (doubtless at some social function arranged by Mr. Phillies to inaugurate the Federated Jurisdictions) was referred to by the minority in the Court of Appeals (R. 295-296) and is cited by appellants in their brief (p. 35). That Governor Dewey holds a somewhat less flattering view of Benjamin today appears from the letter quoted in the footnote.*

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of thinking only in terms of isolationism or of the "whole loaf" and instead of remaining on the fence indefinitely, for the sake of Orthodoxy, please, be co-operative enough to prepare the way to overcome the apparent obstacles so that your Jurisdiction may come into the Federation. Your entrance will get its wheels rolling.

Please let me hear from you soon.

May Our Good Lord Jesus Christ endue you and your Hierarchs and Flock with the inspiration to take the initiative and lead the way in the path of Unity of the Venerated Orthodox Church.

Faithfully yours,

GEORGE E. PHILLIES
Chancellor of the Federated
Orthodox Greek Catholic Primary
Jurisdictions in America

GEP:ERR

* State of New York
EXECUTIVE CHAMBER
Albany

Thomas E. Dewey
Governor

December 22, 1950.

Archbishop Leonty
Russian Orthodox Greek Catholic Church
of North America
Holy Virgin Protection Procathedral
59 East 2nd Street
New York, New York

DEAR ARCHBISHOP LEONTY:

I have your gracious telegram conveying greetings from the Eighth All-American Sobor of Russian Orthodox Greek Catholic Church of North America. I was happy to be able to sign the Acts

POINT VII.

None of the other alleged errors assigned by appellants merits serious consideration.

A. The statute effects no transfer of property.

Appellants assert (brief, p. 41) that the "Mother Church has (apart from its religious and canonical interest) a vested *property* interest in the Cathedral and its use by it and its Archbishop as his *residence* and as the headquarters of the diocese." The simple answer to this is that the entire ownership of the Cathedral is vested in appellee. Its members consist of all of the worshippers of the *Russian Church in America*, just as the members of a municipal corporation consist of the citizens or inhabitants (*Werlein* v. *New Orleans*, 1900, 177 U. S. 390, 402).

The assertion (appellants' brief, p. 41) that the Mother Church built and maintained the Cathedral is contrary to the evidence. The St. Nicholas' Corporation built and maintained the Cathedral with funds derived from (*a*) local contributions (*b*) the Russian government (*c*) the Church of Russia. The contribution of the last named may have been nominal. In any event the source of the funds with which the Cathedral was built and maintained does not bear on the question of ownership (*Ferraria* v. *Vasconcellos*, 1863, 31 Ill. 1, 54). The dedication of property to religious use, by absolute gift to a religious corporation, vests no

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of the New York State Legislature in 1945 and 1948 which confirmed the members of the Russian Orthodox Greek Catholic Church in the possession of Saint Nicholas Cathedral in New York City, thus freeing it from the evil and sacrilegious influence of representatives of the Soviet.

I join you in looking forward to the time when all worshippers of the Orthodox Greek Church in the world will be free from the clutches of the Soviet Government.

Sincerely yours,

THOMAS E. DEWEY.

TED:RM.

property rights in the general body with which the corporation is connected (*Westminster Presbyterian Church* v. *Presbytery*, 1911, 142 App. Div. 855, 875; cf. *Girard* v. *Philadelphia*, 1868, 7 Wall. 1, 14; *Canovaro* v. *Brothers of Hermits of St. Augustine*, 1937, 326 Pa. 76, 88-96).

It is to be noted that in the papers connected with the transfer of title from St. Nicholas' Corporation to Archbishop Evdokim, which were introduced in evidence by appellants (Def. Ex. F), no suggestion was made that the "Mother Church" had a property interest in the premises.

The Church of Russia has no standing to claim that its property is being taken without due process. Under Soviet law it is not a juridical person, and has no right to own property (R. 168*). Under Soviet law the Church in Russia consists of the top hierarchy and local parishes that are independent of superior control (*supra*, p. 34). Nor is the Church of Russia a juridical person under American law (*cf. Pawlet* v. *Clark*, 1815, 9 Cranch. 292, 325, to the effect that the Church of England is not a corporation).

The statute as applied in this case merely confirms beneficial ownership of the Cathedral where it has always been since the parish church became a cathedral church *viz.* in the members of the old diocese and autonomous metropolitan district. The property has not been taken from anybody or transferred to anybody.

B. No federal question is presented by the fact that the action was commenced one day before the statute became effective.

As has been indicated under the preceding subheading, the statute affected no vested rights, but confirmed owner-

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* The Trial Court's attention was called to the decree of January 23, 1918, entitled "On separation of the Church from the State and the school from the Church" of which §12 provided "No ecclesiastical or religious society whatsoever, has the right to own private property. Such societies do not enjoy the rights of juridical persons" (See Gsovski, op. cit., 8 Fordham L. Rev. 10 n. 46).

ship of the properties where it had always been. The statute laid down a rule for the administration of the properties. The same result might be reached by the courts in the absence of the statute. There is no reason, therefore, why a court should not look to the statute for guidance in adjudicating an action pending when the statute was enacted.

Suppose that Benjamin had never intervened. Appellee would have recovered judgment against John Kedroff, but the title adjudicated in appellee would, nevertheless, have been subject to the provisions of Article 5-C (cf. *Westminster Presbyterian Church* v. *Trustees of Presbytery of N. Y.*, 1918, 222 N. Y. 642, where the judgment in ejectment directed by the Court of Appeals expressly provided that plaintiff's title was subject to the provisions of the Religious Corporations Law, including article 4 relating to Presbyterian Churches and containing a provision, §69 subd. 3, requiring denominational control).

As a matter of fact the amended complaint was not served on Kedroff until April 26, 1945, when the statute had become effective. Perhaps in that pleading appellee should have alleged facts showing that it was a *Russian Orthodox church* as defined in the statute and that the title sought to be adjudicated in it would be subject to the statute. The failure to do so, if a mistake, omission, irregularity or defect, might have been corrected or supplied at any stage of the action or appeals (cf. *Aktieselskabet etc.* v. *W. A. Kirk & Co.*, 1943, Sp. T. N. Y., 180 Misc. 979, 981) or, if a substantial right of any party should not be thereby prejudiced, must be disregarded (Civil Practice Act §105). Certainly no substantial right of appellants is prejudicial by disregarding the defect, if any, in the pleading. That appellee based its rights on the statute, as well as on the common law, was fully disclosed at the trial (R. 44). In

fact, appellee introduced the 1945 act in evidence (Pl. Ex. 15: act of April 10, 1945, not printed, off. R. 75).

C. The remarks of the Court of Appeals as to what would have been the disposition of the case in the absence of the statute have not the finality required for review in this Court.

The decision appealed from was based on the statute. If there had been no statute and the Court of Appeals had reversed the judgments of the lower courts and ordered a new trial, appellants would not have been in a position to bring the case to this Court by appeal or certiorari. If the statute is held unconstitutional, appellee is entitled to a new trial. This is especially important by reason of the fact that appellee had no opportunity to meet the constitutional issue in the trial court, where it was not raised by appellants until after the close of the trial and then only in connection with the construction of the statute.

D. The use by the Court of Appeals of the record in *Kedrovsky* v. *Rojdesvensky* was not material.

It is true that some of the circumstances surrounding the appointment of Platon by Tikhon, as narrated in Judge Conway's opinion (R. 257-258), do not appear in the present record. But they have no materiality. Appellants cannot question the validity of the appointment, since they themselves introduced into evidence the patriarchal decree purporting to dismiss Platon.*

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*Appellants are indignant (brief, p. 46, n. 30) over the reference to the written appointment of Platon, but the patriarchate, which presumably knows the facts, published the following:

> "* * * in September, 1923, Patriarch Tikhon, already informed of the position of the American flock, appointed Metropolitan Platon as Administrator of the North American diocese, relieving him of the administration of the diocese of Herson and Odessa in Russia."

Translation of extract from Journal of the Moscow Patriarchate, No. 7, July, 1950.

E. The defense of limitations was ruled on below.

The defense was argued fully in all of the courts below. Appellee contended that the statute was tolled until Kedrovsky's death in 1934 by the injunctions obtained by him against Platon and against appellee, respectively. Upon appellants' motion for reargument in the Court of Appeals, when for the first time they conceded that appellee had legal title, appellee made the additional point that occupation of the Cathedral by Kedrovsky was not adverse, but in subordination, to appellee's title and that, therefore, appellee, while not in occupancy, was seized of the premises within the statutory period.

Appellants admit (brief, p. 48) that their motion for reargument "specifically requested a ruling on this issue." Since their motion was denied it must be deemed that the court considered the defense without merit. The court was not obliged to make a specific ruling or write an opinion on the point.

Whether or not the defense has merit is not a federal question.

Conclusion.

The judgment should be affirmed.

Respectfully submitted,

RALPH MONTGOMERY ARKUSH,
Counsel for Appellee.

APPENDIX A.

LIST OF DATES.

		Referred to in This Brief on Page:
987	Russians converted to Christianity	10
1453	Fall of Constantinople; independence of Moscow Metropolitanate	10
1589	Patriarchate of Moscow recognized by Ecumenical Patriarch	10
1721-1917	Russian Church governed by Most Sacred Governing Synod	10
1793	Russian Mission founded in Alaska	2, 11
1870	Diocesan see moved from Sitka to San Francisco	11
1875	Denominational control of churches in New York provided for by statute	90
1893	Russian Orthodox congregation in New York	17
1899	Saint Nicholas congregation incorporated under Religious Corporations Law of 1895	17
	St. Nicholas' Corporation acquires land	17
1903	Parish church built	17
1905	Parish church consecrated	17
	Diocesan see transferred from San Francisco to New York: parish church becomes cathedral	11
1917-1918	Great Sobor in Moscow	10
	Tikhon chosen Patriarch	11

		Referred to in This Brief on Page:
1918	Confiscation of church property in Russia	11
	Kedrovsky v. *Russian Catholic Church* commenced	
1920		
Nov. 20	Patriarchal ukase No. 362	14
1922-1927	Central office of Patriarchal Church suppressed	12
1923		
April 29-May 9	Pseudo-Sobor of Renovated Church	12
June	Patriarch released from prison	13
Sept. 29	Patriarchal decree appointing Platon administrator of North American Diocese	15
Oct. 4	Renovated Church excommunicates Platon	15
	Renovated Church appoints Kedrovsky	15
1924		
Jan. 16	Ukase No. 28 dismissing Platon	16
March 29	*Kedrovsky* v. *Rojdesvensky* commenced	17
April 2-4	Sobor at Detroit	18
Oct. 27	Trial of *Kedrovsky* v. *Rojdesvensky* opens	24
Dec. 24	Decision of Special Term in *Kedrovsky* v. *Rojdesvensky*	24
1925		
Mar. 8	Patriarch Tikhon dies	13
April 8	Appellee incorporated by special act	6, 26
April 17	St. Nicholas' Corporation conveys to appellee	7, 27
April 23	First meeting of incorporators and trustees of plaintiff-appellee	27
Nov. 27	Opinion of Appellate Division in *Kedrovsky* v. *Rojdesvensky*	29
1926		
March 30	Decision of Court of Appeals in *Kedrovsny* v. *Rojdesvensky*	30
	Platon leaves Cathedral	31

		Referred to in This Brief on Page:
1927		
June 10	Central office of Patriarchal Church reopened: Sergius pledges loyalty to Soviet regime	33
1929		
Oct. 1	Soviet decree enforcing congregational polity	34
1933		
March 22	Metropolitan Benjamin appointed (ukase No. 29) Patriarchal Exarch in America	35
	Metropolitan Benjamin arrives in the U. S. and demands pledge of loyalty to Soviet regime	35
	Ukase No. 28 delivered to Platon	
Aug. 16	Ukase No. 61 recalls Platon, called schismatic	35
	Metropolitan Benjamin organizes new diocese	37
1934	Platon dies	38
June 29	Ukase No. 1005 appoints Benjamin ruling Bishop	36
Nov. 20-23	Sobor at Cleveland: Theophilus elected Metropolitan and Normal Parish Statutes adopted	38
	Kedrovsky dies; succeeded by son Nicholas Kedroff who occupies premises	32
1935	Interdict laid on Metropolitan Theophilus and his clergy	38
1937		
Oct. 5-8	Sobor in New York: statutes for administration of *Russian Church in America* adopted	38
1940	Court of Appeals refuses appeal in *Yonkers* case	38
1943	Sergius becomes Patriarch	36

		Referred to in This Brief on Page:
1944	Nicholas Kedroff dies: younger brother John, appellant here, occupies premises..	32
	Death of Patriarch Sergius; telegram of condolences of *Russian Church in America* to *Locum Tenens*.....	38
1945		
Jan.	Sobor at Moscow: Alexy elected Patriarch	39
	American delegates put down in Siberia and arrive too late for Sobor.....	39
Feb. 16	Patriarchal ukase proposing terms for lifting interdict on *Russian Church in America*	39
April 9	This action commenced.....	6
April 10	Act inserting Article 5-C became effective....	8
April 26	Amended complaint in this action served....	108
May 22-24	Bishops Council at Chicago rejects Patriarchal ukase of Feb. 16, 1945.....	40
July 10	Statement of Metropolitan Council explaining rejection	40
Sept. 7	Patriarchal ambassador Archbishop Alexis arrives in United States.....	42
Oct. 8	Appellant John Kedroff surrenders premises to Patriarchal Church and accepts reordination	42
1946		
Nov. 26-28	Sobor at Cleveland requests Patriarch accepts terms of autonomy.....	43
1947		
Jan.	Exchange of cables between Theophilus and Patriarch	44
	Metropolitan Benjamin intervenes in this action	7.

APPENDIX B.

RELIGIOUS CORPORATIONS LAW

ARTICLE 5-C [New]

RUSSIAN ORTHODOX CHURCHES

Sec.

105. Definitions.

* * * * * *

107. Government of incorporated Russian Orthodox churches; powers and duties of trustees.

* * * * * *

Article added by L. 1945, c. 693, eff. April 10, 1945.

§105. Definitions.

The "Russian Church in America", as that term is used anywhere in this article, refers to that group of churches, cathedrals, chapels, congregations, societies, parishes, committees and other religious organizations of the Eastern Confession (Eastern Orthodox or Greek Catholic Church) which were known as (a) Russian American Mission of the Russian Orthodox Church from in or about seventeen hundred ninety-three to in or about eighteen hundred seventy; (b) Diocese of Alaska and the Aleutian Islands of the Russian Orthodox Church from in or about eighteen hundred seventy to in or about nineteen hundred four; (c) Diocese of North America and the Aleutian Islands (or Alaska) of the Russian Orthodox Church from in or about nineteen hundred four to in or about nineteen hundred twenty-four; and (d) Russian Orthodox Greek Catholic Church of North America since in or about nineteen hundred twenty-four; and were subject to the administrative jurisdiction of the Most Sacred Governing Synod in Moscow until in or about nineteen hundred seventeen, later the Patriarchate of Moscow, but now constitute an administratively autonomous metropolitan district created

pursuant to resolutions adopted at a general convention (sobor) of said district held at Detroit, Michigan, on or about or between April second to fourth, nineteen hundred twenty-four.

A "Russian Orthodox church", as that term is used anywhere in this article, is a church, cathedral, chaptel[1], congregation, society, parish, committee or other religious organization founded and established for the purpose and with the intent of adhering to, and being subject to the adminitrative jurisdiction of said mission, diocese or autonomous metropolitan district hereinabove defined as the Russian Church in America. Added L. 1945, c. 693; amended L. 1948, c. 711, §1, eff. March 31, 1948.

[1] So in original. Probably should read "chapel".

* * * * * *

§107.1. Government of incorporated Russian Orthodox churches; powers and duties of trustees.

1. Every Russian Orthodox church in this state, whether incorporated before or after the creation of said autonomous metropolitan district, and whether incorporated or reincorporated pursuant to this article or any other article of the religious corporations law, or any general or private law, shall recognize and be and remain subject to the jurisdiction and authority of the general convention (sobor), metropolitan archbishop or other primate or hierarch, the council of bishops, the metropolitan council and other governing bodies and authorities of the Russian Church in America, pursuant to the statutes for the government there f adopted at a general convention (sobor) held in the city of New York on or about or between October fifth to eighth, nineteen hundred thirty-seven, and any amendments thereto and any other statutes or rules heretofore or hereafter adopted by a general convention (sobor) of the Russian Church in America and shall in all other respects conform to, maintain and follow the faith, doctrine, ritual, communion, discipline,

canon law, traditions and usages of the Eastern Confession (Eastern Orthodox or Greek Catholic Church).

3. The trustees of every Russian Orthodox church shall have the custody and control of all temporalities and property, real and personal, belonging to such church and of the revenues therefrom and shall administer the same in accordance with the by-laws of such church, the normal statutes for parishes of the Russian Church in America approved at a general convention (sobor) thereof held at Cleveland, Ohio, on or about or between November twentieth to twenty-third, nineteen hundred thirty-four, and any amendments thereto and all other rules, statutes, regulations and usages of the Russian Church in America. Added L. 1945, c. 693; amended L. 1948, c. 711, §2, eff. March 31, 1948.

APPENDIX C.

Translations of Extracts from Articles Published in JOURNAL OF THE MOSCOW PATRIARCHATE

No. 3, March, 1950

Church and Peace

(pp. 22-23)

Before speaking of what weapon is in the possession of, and how it will be used by the front of the friends of peace, it is necessary to answer the question: against whom does this front direct its tremendous forces?

The front of the advocates of peace opposes the front of world reaction. The core of the latter is formed by those hundreds of families who possess the world's riches, and those surrounding them in the guise of the closest servants and myrmidons of capital. These include those governments and classes who lead colonial wars, exploit the workers in the interest of gain and aspire by all means to world domination. For this particular purpose they prepare a new devastating war against the Soviet Union and the countries of the peoples' democracies. Developing the race for rearmament, they outdo themselves in the invention of bacteriological weapons, atom and hydrogen bombs and other means for the mass destruction of people.

It is not difficult to see that all these actions stem from people who have lost, not only the understanding of history, but conscience itself, not to mention other moral principles. It is true that in their ideological arsenal there can be found certain humanitarian and even Christian ideas, but they are applied only as a cover for a feral psychology. It is often revealed in the attempts of the ideologists of captalism to justify its policy and to find a way to save the dying order.

Indicating such a way, a certain William Fogt in his book, published in 1948, literally writes the following: "The

lessening of the population of Europe would be the greatest good in the matter of general peace". Or further: "From the point of view of all humanity the famine in China is, perhaps, not only desirable, but necessary". And finally: "the greatest advantage which Chile possesses is the high death rate of its population".

The best illustration of this cynical philosophy is the real policy of the government of the USA, which following upon the aggressive North-Atlantic block of governments, aspires now to create a new ring of satellite countries from Japan to Burma, and to arm them with cannon, with the avowed purpose of lessening the population in Asia. The American policy of giving "aid" to the little developed Asiatic regions speaks of the same thing. In the meantime, American philanthropists do not wish to sell India a million tons of wheat at moderate prices, aiming, apparently, at bringing the population of India to famine, instead of China, where this scheme has finally failed.

In short, every day brings more and more new facts and proofs of the humanity-hating policy of the front of reaction, which is manfully opposed by the progressive front of the fighters for peace.

What weapons does the front of the friends of peace have, and use, in differentiation from the instigators of war, and by what means does it move toward the established great purpose?

Elucidating these questions from a religious point of view, it must be said that such as is the purpose, such is the way to its realization. For instance, the purpose of unleashing a new war, masked on the outside by a hypocritical care for peace, betrays itself in methods of intimidation and terrorization of nations by new weapons of destruction, as well as the unasked interference of imperialists in the internal affairs of separate countries. It is also seen in the policy of attacks on the standard of living and the civil rights of the workers, as well as race discrimination, in the race for rearmament, in the "cold war" against the Soviet Union, in the propaganda of enmity and hate

toward countries of the peoples' democracies. Secret agreements against the USSR, China and other independent countries, lead to the same end. No less significant in this regard are the examples of subversive work in those same countries, as well as the persecution of the partisans of peace in the sphere of imperialistic influence.

On the other side, the high aim of the defense of peace is attained by its partisans by altogether different means. To these pertain, first of all, numerous congresses and conferences on peace, protests and demonstrations of the workers against the aggressive policy of reactionary governments, the condemnation of colonial wars and the race for rearmament, appeals for the ending of the "cold war" with the Soviet Union and the countries of the people's democracy, the collection of signatures in favor of peace, and many other means of organizing public opinion against the preparations of imperialistic powers for a new war.

For instance, here is the manifesto of the fighters for peace, functioning in France: "In the name of humanity and the right to life: we want our government to speak out for the declaration of the atomic bomb as outlawed; we want the United Nations to adopt immediately a resolution as to the destruction of stores of atomic bombs; we demand that everyone who threatens the world with atomic warfare, be looked upon as a military criminal; we call upon all government organizations to bring influence to bear upon their government in the name of the triumph of reason".

In one instance, calling upon their governments for reason, in another, the fighters for peace, refuse to transport weapons and troops, in a third—go on strike, refusing to transport weapons, in a fourth protest against annexation to the aggressive North-Atlantic block, in a fifth—present a petition to the United Nations Organization with a demand for the convocation of a conference of the four powers. And everywhere the forces of peace act honestly and openly, applying entirely democratic, morally legal

means of struggle, stemming from a reasonable will and calling also for reason.
(p. 25)

. . . . . .

Undoubtedly, to the one front of Orthodox Churches, defending humanity from a new war, are also attracted the faithful masses of Catholics and Protestants, who realize the oneness of the Christian ideal and the obvious departure from it of their "spiritual" leaders. For instance, in Paris, for more than a year already, there exists and develops its activity a Union of Christian-progressives. They write that "the time has come when it is necessary for Christians to go hand in hand with the communists, as they did at the time of the struggle with the German occupation. . . ."

. . . . . .

A. KRASHENINNIKOV.

No. 4, April, 1950

(p. 38)

The Roumanian Orthodox Church and the Defense of Peace. Epistle of the Holy Synod to the Orthodox Clergy and the Faithful and all Christians of the Roumanian Peoples Republic.

. . . . . .

While the enemies of peace, the instigators of war, threating freedom and the right to life of honest toiling people, enemies of love and agreement among nations, enemies of prosperity and happiness, are condemned by the Church according to the Gospel of the Holy Apostle Paul: "Know ye not that the unrighteous shall not inherit the kingdom of God? Be not deceived. . . . Nor thieves, nor covetous, nor drunkards, nor revilers, nor extortioners, shall inherit the kingdom of God" (I Cor. 6, 9-10).

In our time we see that the enemies of peace close up their ranks into a camp, which threatens the life of freedom-

loving nations and working people of the world. At the head of this camp are the rich of England and America.

• • • • • •

CHAIRMAN OF THE HOLY SYNOD

Justinian, Metropolitan of Hungary-Vlakhi, *locum tenens* of the metropolitanate of Moldava and the Patriarch of Roumania.

MEMBERS OF THE HOLY SYNOD:

Nicholas, Metropolitan of Ardyala
Phirmilian, Metropolitan of Oltenyi
Vassily, Metropolitan of Banga
Sebastian, Archbishop of Souchava
Joseph, Bishop of Rymnik and Ardjesha
Antim, Bishop of Bouzey
Theophilus, Bishop of Roman and Khoutschi
Andrew, Bishop of Arada
Antim, Bishop of Galatza
Nicholas, Bishop of Oradya
Nicholas, Bishop of Klouga
Caesar, Bishop of Constance

No. 4, April, 1950

Speech at the Meeting of the Soviet Committee for the Defense of Peace Dedicated to the Meeting with the Delegation of the Permanent Committee of the World Congress of the Partisans of Peace.

• • • • • •

(March 7, 1950)

(p. 32)

Upon returning from the Congress I made a series of reports in Moscow, Leningrad and other cities as to the results of the Congress and its resolutions. The monthly "Journal of the Moscow Patriarchate" from May 1949 on has given its pages for a special section "In the Defense of

Peace" in which are printed material and articles on this great problem of our times.

I expressed in the name of the Russion Church the conviction that the result of the struggle of the mass of mankind against the worthless group of instigators of war, thirsting for world dominance, is foreordained. "There are not and there cannot be on the earth—I said—any of the most cunning means that could defeat the artless strength of simple people, in whose hearts undying faith in truth is ineradicable".

METROPOLITAN NICHOLAS

No. 5, May, 1950

Church and Peace

(pp. 34-35)

Can it be possible that these words, spoken by Metropolitan Nicholas, are still not strong enough to instill abhorrence of the horrors and destruction of war! It would seem that there could not be found a man who would wish for a new war. But, unfortunately, there are such people —it is they who wish to turn the blood of humankind into a means for the acquiring of material advantages, the accumulation of gold.

But we believe that this road of the contemporary pharisees and bankers—the Anglo-American imperialists —will not meet with success and that they will not be able to push millions of simple people, who aspire to peace, want to live in peace, want to die in peace, into a brother-slaying war. Such is the spirit of the new times. Today the movement for peace is growing from one end of the world to the other. And it is impossible to find a force on

earth which could hold back the elemental desire of nations for peace and democracy. Therefore it is proper to quote here the words of the Metropolitan of Krutitsk Nicholas to the effect that the movement for peace is an "organic process, steadfast, growing. The new life marches with an inexorable step to replace the rotted old world, bearing within it the poison of malice and of hate".*

. . . . . .

ARCHIMANDRITE JONAH,
Chief Secretary, Holy Synod of the
Bulgarian Church.

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* See "Journal of the Moscow Patriarchate", 1949, No. 5, pp. 14, 16.

No. 5, May, 1950

War and Peace

(pp. 30-31)

. . . . . .

But just at this time from the front line of the capitalistic countries we are again threatened with atomic and hydrogen bombs. And again are justified the words of the psalm-singer: "I am for peace: but when I speak, they are for war" (Psalms 119, 7). They are preparing for war and conspire against the peaceful of the earth (Psalms, 34, 20), while, in reality, these are conspiracies against their own people, because any new war would be a great ordeal for all peoples.

. . . . . .

In fulfillment of this duty the representatives of the Orthodox Church at the All Orthodox Conference of July, 1948, in Moscow, sent an address to the Christians of the entire world. In this address is pointed out the obvious fact that the world is going through a tempestuous time

between the protestant West and the Orthodox East. The Orthodox East is inspired by the great foundations of peace on earth, while the capitalistic and imperialistic West prepares a new war. "Upon us, servants of the Orthodox Church—it says in the address—a horrible impression is made by the fact that the instigators of a new war bear the smell of a Christian—Catholic and Protestant—world. We deeply grieve that, instead of the voice of peace and Christian love, from the fortress of Catholicism—the Vatican, and from the nest of Protestantism—America, we hear the blessing for a new war and hymns of praise for the atomic bomb and similar inventions, intended for the destruction of human life". The address calls upon Christians for unity in the name of peace. "We stretch out a hand to all those who wish that man should be brother to man, and not an animal, and propose, having joined forces in brotherhood, to weaken the kindlers of a new catastrophe, servants of the dark power, for whom the great beginnings of Christian love of peace and brotherhood have long lost any meaning".

CYRIL, Metropolitan of Plovdiv.

("Church Messenger", organ of the Bulgarian Orthodox Church, 1950, No. 8-9)

No. 7, July, 1950

(pp. 18-19).

Future Pastors Carry Out their Duty

* * * * * *

The Russian Orthodox Church has spoken out for peace. Its head—the Most Holy Patriarch Alexy—in his epistle of March 3 of this year to all the Heads of autocephalous Orthodox Churches stated that the clergy of our Russian Orthodox Church has decisively placed itself on the side of the defense and affirmation of peace against the madness

of those holding a sword in their hands and aspiring to a cold and calcuated destruction of millions of human lives.

* * * * * *

Holy and clean, like crystal, is the thought of peace. It has infiltrated the hearts of all future pastors of the Church. Together with all the peoples of our country, we, the students of the Theological Academy and Seminary, are proud of the strengthening international authority of our Fatherland, which has become the bulwark of all progressive humanity in its heroic struggle for peace. Our Motherland has survived through all storms and dangers, guided by the vigilant pilot—her Captain—the great Stalin, and now she stands in the brilliance of fame and might, as a great power—the bulwark of peace and justice.

Warmly upholding the peace-loving policy of the Soviet Government, we wholly responded to the Proclamation of the Stockholm session of the Permanent Committee of the World Congress of the partisans of peace and believe that peace will triumph on earth, peace will conquer war!

The Students of the Moscow Theological Academy and the pupils of the Theological Seminary (signatures follow)

No. 7, July, 1950

(p. 16)

For Peace!

Speech at the mass meeting (140,000 persons) in defense of peace at Belgrade (Czechoslovakia) July 3, 1950.

* * * * * *

You well know that in the advance guard of the movement for peace there marches the great battle-hardened Soviet nation. The Soviet Union is the support and the hope of the movement for peace. Together with China, with the countries of the peoples' democracies, with millions of friends in all countries our country currently presents such an indestructible power, against whose might, like waves

against a rock, will break any inclinations of those who love to warm their hands at the fire of war's conflagration.

* * * * * *

Together with all the honest citizens of the entire world the Soviet people tell the instigators of war, the Anglo-American heads of imperialistic reaction: our wish for peace is inflexible; we, and all the nations marching with us, will fight for peace selflessly and heroically, to the end, to victory! And grievous will be the wrath, merciless the reckoning if you will dare to violate the peace won at high cost!

* * * * * *

METROPOLITAN NICHOLAS.

No. 8, August, 1950

(p. 22)

Church and Patriotic Duty.

More than five years have passed since our valiant people saved their liberty and independence in a most bitter war against the Hitler usurpers. But in our memory the remembrance is still fresh of the horrors we went through then: we remember the torrents of human blood, the barbaric destruction of beautiful cities, the devastation of grain-bearing fields; we will never forget how the enemy soiled our holy earth with his feet.

In strenuous toil our people is successfully healing its wounds, inflicted by the enemy; already the face of our land has reformed unrecognizably. But, toiling, building, our people never forgets the threat of a new war. We are all very well aware that the cultural and economic blossoming of our wonderful home-land—USSR, is not to the liking of all capitalists. They are arming madly, they are preparing death-dealing weapons against our peaceful country, against the countries of the peoples' democracy. From

threats they have gone to armed attack upon the Korean republic, their aerial pirates barbarically shoot the peaceful population of Korea.

• • • • • •

Pitirim, Archbishop of Minsk.

(p. 3)

No. 8, August, 1950

Address of the Patriarch and Synod of the Russian Orthodox Church to the Security Council of the Organization of the United Nations.

The Patriarch and Synod of the Russian Orthodox Church have addressed the following statement to the Security Council of the United Nations Organization:

New York, Lake Success
Security Council
United Nations

STATEMENT

of the Patriarch of Moscow and all Russia Alexy and his Holy Synod.

Experiencing the bloody events occurring in Korea, whose people endure the horrors of a blood-shedding war, when whole villages are swept away from the face of the earth by brutal bombings, when cities with their hospitals and schools are wrecked by bombs and death-dealing weapons, when are heard the moans of dying defenceless children, mothers and old people, when their blood cries to heaven—the Russian Orthodox Church, in my person and that of the Most Holy Synod, cannot remain indifferent to the sufferings of the Korean people and raises its voice in the defense of truth. It is unable not to express its compassion to the distressed country and [it] protests against American aggression in Korea.

It is clear to the whole world that there was interference in the internal affairs of the Korean people on the part of the United States of America, whose leaders widen their military activities more and more and aim to draw other governments into these actions against Korea.

The Russian Orthodox Church decisively condemns this interference and the inhuman extermination of the peaceful population of Korea taking place by the American air force. It insistently calls, in the name of Christ—the Savior of the world, for the cessation of violence and bombing, for the withdrawal of foreign troops from Korea and for the complete ending of the illegal war.

Preserving its faith in the strength and efficacy of the United Nations Organizations, called to preserve peace among nations, the Russian Orthodox Church, with an expression of deep sorrow in regard to the events in Korea, appeals to the Security Council, as the Central Organ of international peace, with a fervent plea to take all measures for the immediate peaceful settlement of the situation which has arisen.

ALEXY, Patriarch of Moscow and all Russia
Members of the Most Holy Synod:

NICHOLAS, Metropolitan of Krutitsk and Kolomen

JOHN, Metropolitan of Kiev and Galicia, Exarch of the Ukraine

GREGORY, Metropolitan of Leningrad and Novgorod

CORNELIUS, Archbishop of Gorky and Arzamask

JOHN, Archbishop of Molotov and Solikamsk

PANCRAS, Bishop of Volynsk and Roven

August 21, 1950, Moscow

"Izvestia" of August 23, 1950, No. 200

No. 9, September, 1950

(p. 6)

The First Step Toward Peace.

Only five years have passed since the silencing of the thunders of the second world war, and already we can see the horrors of a new extermination of the people. The source of general worry is the martial policy of the new pretenders to world domination, aspiring—so as to ease their task—to decimate the population of the terrestrial orb through the aid of atom bombs and other, previously unknown, weapons for the destruction of life. They are already testing their strength on the peaceful inhabitants of the Korean peninsula, aspiring to kindle the fire of a new world war.

But contemporary peoples, who have not forgotten the recent tornado of death, want to live in peace and quiet with each other and are applying all their strength to force the warmongers to give up their criminal intents. • • •

METROPOLITAN BARTHOLOMEW.

No. 8, August, 1950

The New Investment of the Church in the Matter of Peace.

• • • • • •

(p. 26)

It is well known that the collection of signatures to the Stockholm Proclamation turned into an authentic world referendum, obligated to express and organize the completely apparent superiority of the forces of peace and to oppose them to the bunch of warmongers, sowing death. But with the success of the referendum the opposition to it has also increased on the side of the instigators of war. With even more violence they have headed the hostile propaganda against the partisans of peace and have increased martial preparations. More than that, they have kindled the fire of war in Korea.

• • • • • •

[Article then refers to speech of Metropolitan Nicholas at conference of clergy in Czechoslovakia in July, 1950. Met. Nicholas was head of Russian delegation.]

(p. 27)

Having further shown the opposition of the peaceful ideals of humanity and of the schemes of the instigators of war, Metropolitan Nicholas exposed the attempts of the latter to base their humanity-hating policy in the unleashing of a new war, on the high authority of the Christian religion, whose defenders they declare themselves to be. "We must" he said "explain to all the faithful, that Christianity, as a religion of love and peace, does not need the defense of those who, with the aid of atomic bombs and deadly bacteria, are cold-bloodedly preparing to exterminate the population of an entire half of the terrestrial globe; who see in the law of motherhood a cause for economic crisis; who take an epidemic of the plague or of cholera to be a boon of nature, who, planning a new war, call the recent one an old fashioned war. There can be nothing in common with Christianity in people who do not carry out, but who monstrously pervert Christ's work, in the interests of their terrestrial kingdom".

A. KRASHENINNIKOV.

No. 9, September, 1950

(p. 8)

Signed with Heart's Blood

At the present time, not only in our great country, but throughout the world, people of good will are hastening to sign the Stockholm Declaration.

What has happened? Why is humanity so disturbed?

Why only recently we have passed through the test of a dreadful ordeal, have lived through the oppressive days of a lengthy merciless war and, it would seem, that the

very thought of war should forever disappear. Almost every one amongst us has offered someone near to him in sacrifice to war. The tears of sorrow and of pain have not dried as yet, the wounds are not yet healed, the destruction not yet liquidated, and already again and yet again is spoken the dreadful word "war".

What is the cause for this martial disturbance and who are these people contributing to its growth?

These people—are iniquitous money-grubbers who have amassed their wealth at the price of the tears and the blood of humanity. They are afraid to lose their gold, they tremble for it and are ready to drench the world in blood again, only to preserve their wealth. To them suffering and sorrow, blood and death—are nothing. Their aim—is to terrify harrassed humanity.

Remember recent events! The end of the world war. Fascist Germany is broken, conquered. Japan still fights. And at this moment atom bombs are dropped upon the cities of Japan. What is the purpose of this dreadful, mad act?

The purpose—is to intimidate for the future: be subject to us, live as we wish you to, otherwise we will shower you with these bombs. But the peoples do not want to live at the orders of blood-thirsty money-grubbers, they build life on new foundations, the foundations of God and humanity. And in response to the threat of a new war, a new battle, throughout the world there has risen a spontaneous movement for peace on the part of men of good will.

This movement is unified in the Permanent Committee of the partisans of peace which calls upon everyone to whom peace is dear, who enjoys life and work, who pities old people, who loves children—to sign the Declaration of this Committee and so bear witness to his wish for peace. It may be that some are thinking: what does a signature mean in the face of the evil will of the bloodthirsty and, at the same time, powerful people, can it help?—Yes,—we will answer—it can: that signature will unite hundreds of millions of people into one whole and will be a stern warning to the blood-thirsty beasts of prey.

Among the active fighters for peace we see clergymen, such as our Most Holy Patriarch Alexy, Metropolitan Nicholas of Krutitsk and Kolomen, such as the rector of Canterbury Cathedral, Dr. Johnson; we see the greatest representatives of the world of science; such as academician Joliot-Curie, writers, people of the most different professions, different skin color, different faiths, but united in one thought, one will and desire to fight for peace.

And that will, that union frightens the bloody criminals more than the mightiest weapon, for they understand what mean these signatures, collected throughout the world.

Then, do we sign the Declaration with ink? No, we sign with the blood of our hearts, the blood of those sufferings felt by our Motherland and each of us individually.

Our signature says: How long, Oh Lord? How long will evil people abuse Your name, how long will they doom humanity to new and yet new torments, how long will these evil people—bloody criminals—speak and act for the sake of their odious, mercenary aims?

May God bless all those who toil for the good of the world, and may the punishment of God fall upon the kindlers of war.

BISHOP VARLAAM.

No. 9, September, 1950

(p. 13)

Meeting of Three Patriarchs

On August 2-11 the Most Holy Patriarch of Moscow and All Russia, Alexy, made a trip to Tbiliss and Echmiadzin so as work out and sign, together with the Georgian Patriarch-Catholicos Kallistrat and the Patriarch-Catholicos of all Armenians George VI, an "Appeal of the Heads of the Russians, Georgian and Armenian Churches to the Christians of the entire world".

[Article goes on to describe meeting and church services and quotes excerpts from various speeches made, including the following made by Patriarch-Catholicos Kallistrat of the Georgian Church.]

"And this very goodness of Your [Patriarch Alexy] soul has bought You here and today, but only on another matter. It is known to all that our self-styled Christian western neighbors, kings of billions [dollars], rich from the sweat and blood of their lesser bretheren, find that there are now too many people on the earth and that their numbers should be lessened—either by means of the dissemination among them of poisoned items of prime necessity, by not taking measures against epidemic diseases, or by the use of atom bombs or other means of intimidation or extermination of the sons of God.

Your repeated speeches against these enemies of humanity, these disturbers of peace throughout the world, are known to all, but You are not satisfied with this: having overcome the difficulties of a long journey, You came to the old and hot city of Tbiliss so as to, together with the two heads of the Christian Churches, the Georgian and Armenian Patriarchs, living in our Great Union, enter into the battle against the enemies of peace, with the dynamic and efficient [weapon], sharper than any double-edged sword —the word of God, piercing even to the division assunder of soul and spirit, and of the joints and marrow, "and is a discerner of the thoughts and intents of the heart (Heb. 4, 12). * * * *"

Prof. N. Dogroussov.

No. 9, September, 1950

(pp. 43-44)

A Mission of Friendship

With the blessing of the Most Holy Patriarch Alexy a delegation of the Russian Orthodox Church was sent to the Patriarchate of Antioch. The delegation was headed by Metropolitan Gregory of Leningrad and Novgorod; he was accompanied by: Germogen, Archbishop of Krasnodarsk and Kouban and the Administrator of the affairs of the Moscow Patriarchate protopresbyter N. F. Kolchitsky.

(Article describes trip and quotes speech made by Metropolitan Gregory in the Cathedral at Damascus, as follows):

* * * *

"The world now, as it seems never before, is caught in a struggle between two opposite ways of life; on the one side, the sincere, broad and warm inclination of the great majority of the simple and honest people of the whole world toward the settlement of truth and a firm peace among peoples and, on the other side, the obdurate furious struggle of a selected clique, comparatively small, but risen to the top of wealth and power—for the preservation of personal, selfish interests, cloaked by plausible excuses, but undaunted by the most brutal means for the attainment of the indicated goal — the strengthening of its commanding position in the world. * * *"

ARCHBISHOP GERMOGEN

No. 10, October, 1950

(p. 21)

For Peace, Against War

* * * * * *

The fight of nations for peace has such power as cannot be resisted. Just recently, when the government of the USA has shifted from the preparation of aggression to the open act of aggression against the Korean people, the struggle for peace has risen to a higher level, has taken on more of the character of the masses. As witness to this is the fact that more than 500 million people have already signed the Stockholm Proclamation since the day of its publication.

Among millions of people hatred flares with new force against the Anglo-American warmongers, still wider spreads the collection of signatures in those countries where, up to now, the fight for peace had been poorly organized. The number of partisans of peace is growing notice-

ably in the USA and England—nests of imperialistic reaction.

"Hands off Korea!"—"Freedom and peace to nations!"—"Yankees, get out!"—with these words powerful columns of workmen go through the streets, people of different parties, different convictions and points of view, different faiths. The union of national masses against the danger of war knows no limitations of political or religious character.

In the USA itself many democratic organizations, Americans, prizing peace, state a decisive protest against intervention in Korea to President Truman and to Congress. "Not one man, not one weapon, not one plane for mass extermination! Forbid the atom and the hydrogen bomb by means of international agreement!"—they demand.

Trade union, women's, young people's, religious and other organizations demand the immediate removal of American troops from Korea, the giving to the Koreans of the opportunity to decide their problems, condemn the bankrupt fascist regime to Li Sun Man.

During this period the tempo of the collection of signatures to the Proclamation of the Stockholm session of the Permanent committee of the partisans of peace has signally increased. Two million Americans have already put their signatures under the Stockholm Proclamation.

The conference in defense of peace, which took place recently in Chicago, showed that representatives of the most various political stands are capable of uniting around a wide program, demanding the cessation of the "cold war", the outlawing of atomic weapons and the peaceful regulations of all problems between the USA and the Soviet Union.

The address of the conference in which it was indicated that "the American people must take its destiny in its own hands and, while there is still time, save the future of the country, which is travelling along the road to atomic war"—has found a warm response among all classes of American people.

In spite of the intensified persecution of the partisans of peace, more and more of the American workmen, farmers and members of the intelligentsia are signing the Stockholm Proclamation in defense of peace and are demanding the cessation of American aggression in Korea.

* * * * * *

The vast majority of the simple people of the USA share in these words, those who do not want war, insistently demand peace and international cooperation and activate more and more this just struggle against warmongers.

V. Bogatyerev.

No. 11, November, 1950

(p. 11)

Speech at the Second All-Union Conference of the Partisans of Peace

(Moscow, October 17, 1950)

* * * * * *

For the past year it [the Russian Orthodox Church] has participated in all possible ways and means in the struggle for peace: by special Patriarchal addresses to the faithful, speeches and sermons in the churches, wholehearted participation with all the citizens of our great Homeland in the signing of the Stockholm Proclamation, the condemnation through the press of American aggression in Korea, through articles in church and civil publications.

* * * * * *

All mankind must condemn aggression, no matter what its source, armed interference from without in the internal affairs of countries, and, in particular, must condemn the criminal, barbaric aggression of the USA in Korea.

* * * * * *

The Russian Orthodox Church, preaching peace and love, absolutely repudiates any interference of any government in the internal affairs of another country and asks that she be put in the front rank of those fighting for this holy right

of nations to the freedom of their lives. The bestial, bloody aggression of the USA in Korea must be stopped immediately.

• • • • • •

METROPOLITAN NICHOLAS

No. 11, November, 1950

(pp. 21-26)

Peace—to the World

(Second All-Union conference of the partisans of peace)

• • • • • •

In capitalistic countries a breach has long since formed between the simple working people and the rulers—imperialists. The simple man does not need war. He needs work. But there are those, corrupted by that same capitalism, for whom the ideal is wealth, making it possible to live without working. In capitalistic countries there are also people worn out by unemployment. They can be tempted by war. Especially for them posters are displayed in America: "Young yankees! The world—is an American planet. Choose, what is most to your taste: the tropical island of Guam or snowy Iceland, the Philippines or Western Germany, England or Greece. Dedicate yourself to the military profession—it will guarantee you an interesting, rich, adventurous life, travel in the company of friends".

With just such words the mad Hitler urged German youth to conquer the world.

• • • • • •

[Refers to German atrocities, then goes on:]

Unfortunately, today we can not only read about such atrocities but see them. A Korean documentary film has recorded forever "the results of the shooting of the peaceful population by the Americans: country roads, strewn with the corpses of men, women and children; a dead woman, on her knees there where the bullet reached her, her dress still smolders and smokes; small children—a boy and a girl—cry and struggle near the corpse of their mother; a babe in arms shot by a machine gun".

The people committing such atrocities, if in their soul there still smolder but one spark of human understanding, should shudder, seeing the work of their hands. Only ignorance can save them from the judgment of their own conscience. In the contrary situation—they are criminals and subject to the condemnation of society.

The fate of Robert Lewis is a vivid example of personal conscience: "Captain Robert Lewis, a flyer, who piloted a plane to Hiroshima and dropped an atom bomb on that city, has entered a monastery. He decided to atone with his whole life for the crime which he was forced to commit, without his knowledge, as he did not know what kind of weapon was on his plane and dropped by him" ("Partisans of Peace", No. 14, 1950, p. 18).

* * * * * * *

[With reference to the collection of signatures to the Potsdam Proclamation (a peace manifesto):]

Only by slander can the simple man be convinced not to sign this Proclamation because even there were the ruling circles, as, for instance, in America, forbid the collection of signatures, subject the collectors to arrest, trials, throw them into prisons and even have recourse to murders, the signatures to the Potsdam Proclamation are growing.

* * * * * * *

In one of the last speeches of A. I. Vishinsky at a meeting of the Political committee of the General UN Assembly data was given, published in the American press, of the growth of armament and the budget assigned to it (in dollars): "For the budget year 1950-1951 the USA plan to spend close to 50 billion, *i. e.* almost 50 times more than in 1938-1939" ("Izvestia" Oct. 26, 1950).

Such vast appropriations for armament cannot be understood otherwise than as active preparation for war.

* * * * * * *

Honest people of the whole world must protest against war propaganda, against war hysteria, created and conducted by a bunch of blood-thirsty Anglo-American business

men, thirsting to warm their hands at the bonfire of a new war * * *.

* * * * * *

The representative of the Permanent committee of the All-world congress of the partisans of peace, the chairman of the English committee for the defense of peace, Mr. Crowther, attending the Second All-Union conference of the partisans of peace in the USSR, in his speech spoke of the fight of the English people for peace, at the same time condemning the policy of the English government which slavishly acts according to the directives of the United States.

* * * * * *

— A. SHAPOVALOVA

No. 12, December, 1950

(pp. 17-25)

About the Second World Congress of the Partisans of Peace.

A year and a half passed between the First World Congress of the partisans of peace and the Second.

During that time the Russian Orthodox Church appeared repeatedly both within its own country and on the arena of international church relations on questions of the struggle for peace and its defense.

Everyone knows the participation of the Russian Orthodox Church in the All Union Conference of the partisans of peace in August 1949. The honor to head the delegation of our Church and to appear on the tribunal of the conference in the name of the Russian Church fell to me. At the election of the conference I joined the Soviet committee for the defense of peace.

[Article goes on to recite activity of Church as follows:

October 2, 1949—Patriarch Alexy issues proclamation.

February, 1950—Metropolitan Nicholas goes to Czechoslovakia, makes speeches and attends meetings.

March, 1950—Patriarch Alexy sends appeals to all heads of autocephalous Orthodox churches.

March, 1950—As member of Soviet committee [see above] Met. Nicholas welcomes delegation of Permanent World Committee bringing message from that organization to Soviet government.

July, 1950—Met. Nicholas appears at conference of clergy of all Christian faiths at Lougachevitz (Czechoslovakia).

August, 1950—Russian, Georgian and Armenian Patriarchs sent their message from Tbiliss. A conference was held in Prague of the Bureau of the World Committee. * * *]

The Second All Union Conference was called in our country to discuss the Prague proposals and to prepare for the Second World Congress, at which close to 1,200 delegates gathered—ambassadors of all strata of population of our country and representatives of all the republics entering into our great Soviet Union.

* * * * * *

The conference elected a delegation from the Soviet Union to the Second World Congress of the partisans of peace opening in November, of which I was the only one from among ecclesiastical persons.

It had been planned to hold the congress in England, in the city of Sheffield, but, as is known, the majority of the delegates from the Soviet Union, including myself, were not given a visa by the English government.

At the press conference of the Soviet committee for the defense of peace, in the presence of representatives of the Soviet public, among several other delegates not admitted to England, I also appeared with a protest, published in our press.

[Article goes on and describes shifting of congress to Warsaw and goes into great detail as to receptions, flowers presented, meeting rooms, etc. Much space is given to account of personal triumph of Met. Nicholas * * *]

(p. 23)

As is known more than 2,000 persons, delegates and observers were present at the congress. There has hardly ever been anywhere or at any time a congress in which representatives of more than 80 countries of the world took part!

* * * * * *

Of ecclesiastical persons of all faiths (delegates and friends) there were 72; among them of the Orthodox—4, Catholic priests appoximately—22, Anglican—11, Protestant—31, Mussulmen—2 and various—2.

* * * * * *

[Article goes on to describe hearty reunion with Dr. Hewlett Johnson, etc. * * * One of the delegates Met. Nicholas specifically talked with was the Anglican priest Evans, chairman of the Society for Anglo-Soviet Friendship. * * * Then goes into more long descriptions or personal triumph of Met. Nicholas.]

* * * * * *

All the delegates branded with shame the so-called socialistic government of England, having done everything possible to disrupt the Second World Congress of the partisans of peace. * * *

The slanderous appearance of the American delegate Rogge, who tried to disrupt the unity of the congress, rang as a miserable false note in this atmosphere. Revealed as being a paid agent of the Tito clique he remained in complete isolation. As from a leper all the members of the American delegation turned away from him.

On the tribunal there succeeded each other the greatest scientists and workmen, priests and world renowned writers, conservatives and communists, people of all races, nationalities, not only of the most different social positions, but also of different political convictions, religious faiths. * * *

METROPOLITAN NICHOLAS.

No. 12, December, 1950

(pp. 12-14)

Speech at the Second World Congress of the Partisans of Peace

* * * * * *

But not only the instinct of self-preservation, not fear in the face of a new catastrophe was the moving force of these people in their desire to defend the matter of peace. No, we all know, that their main stimulus was and is an aspiration of the highest moral order, an aspiration to prevent the mass crime which is any new aggression, bearing with it not only the destruction of the warring armies, but of masses of the peaceful population, an example of which is the Korea of the present day.

* * * * * *

The unseen range of the movement for peace forces the instigators of a new war to worry; the worry changes to fear, and fear into the passion of self-defense, which has brought into movement the entire refinement of cruelty and many-sided apparatus of aggression in their hands. But there is no longer any force in the world which could hold back this unheard-of power, it is already physically impossible to apply force to hundreds of millions of people, welded together by one will! While at the same time every act of aggression against the partisans of peace on the part of the instigators of war, losing their minds and the ground under their feet, evokes new jolts, new explosions, new waves of protest, strengthens still more the wall of opposition to the criminals.

* * * * * *

Who are these people, who have already lifted their criminal sword over the head of all humanity and are ready to take away from people their greatest good—peace, that first and essential condition of life and progress?

They are—a numerically insignificant group of persons, worshippers of the golden calf, they are madmen. They dare to drag the entire world, including their own peoples,

into tragedy unseen in history and to drown it in oceans of blood and tears.

* * * * * *

Appearing here before you, I speak not only as a citizen of my peace-loving Soviet power—I speak here as a bishop of the Russian Orthodox Church and in her name, with an awareness of the responsibility, lying upon me for every word spoken, to my professed God, the Orthodox Church and history, and, as such, I want to be heard first of all by those who consider themselves christians, not in words, but in deeds.

* * * * * *

Dear friends of peace! Is it possible to listen calmly to the eyewitness accounts of that which is happening in Korea, of the hangings, the executions, the dreadful tortures applied not only to prisoners, but even to the peaceful population—to children, old people, women, the sick; of the thousands of bombs dropped on hospitals, orphanages, schools, of the flaming lava pouring from planes and burning cities, villages, farm lands, people? Is it possible to hear and read without shuddering, pity and compassion for the incredible sufferings of a small peace-loving people, of that hell into which a country of the most ancient culture and kindest nature has been committed?

And is it possible for everyone in whom there has not yet died the last spark of conscience—not to mention the christian, called upon not only to live in peace with his neighbor, but even to love him—to be indifferent to such speeches as the one made recently by rector Pence of a university in the State of Florida in America and which has already been quoted twice by those speaking at our congress (let these words stab our hearts a third time): "I approve bacteriological war, the use of gas, atom and hydrogen bombs and intercontinental rockets. I should not ask for a merciful attitude toward hospitals, churches, educational institutions or any groups of population whatsoever. * * *"

When one ponders on the statements of Pence and others like him, involutarily one asks: "Is it possible that each of them had a mother and a childhood? Is it possible that they have a wife, children, sisters, brothers, friends?" Why the most ferocious, the most savage animal, sated, no longer kills. Truly measureless can be the depth of human fall! This bunch of warmongers have turned into Bedlam where the basic, essential, fundamental human conceptions are not only twisted, but have acquired a directly opposite meaning, where murder is elevated to virtue, and the desire for peace is called a crime.

What do we see in the midst of the torch-bearers of a new conflagration of war?

Shudders and whispers as to some phosphorescent rockets, streaking the night sky across the ocean, mysterious noises and smells and no less mysterious submarines "of Soviet origin" along American shores, gloomy forebodings of countless fortunetellers, astrologers and "clairvoyants", spiritual seances * * *.

* * * * * * *

(Pg. 14)

The Russian Orthodox Church is full of deep joy, finding the widest accord among the faithful and the leaders of other Christian churches. Hand in hand in the worthy struggle for peace, together with the well known theologian, revered by all of us, the Catholic Abbot Boule, there march the equally revered dean of the Canterbury Cathedral, Dr. Hewlett Johnson, and the professor of the Cambridge Theological Seminary in America, the priest of the Episcopal Church, Joseph Fletcher. It is comforting to know and see, how the appearances in defense of peace of faithful Catholics and Catholic priests and bishops of Poland, Czechoslovakia, Hungary, France, Belgium, Italy, the countries of Latin America, appearances that even bring upon them censure on the part of the Vatican, widely answer the protests against the defenders of war on the part of numerous representatives of the Protestant world: Evangelical-

Lutheran, Evangelical-Reformed and other Christian churches.

. . . . . .

(Pg. 15)

And how can the christian conscience reconcile itself with the oppression of colonial peoples or with racial discrimination against negroes?

Can the conscience of a Christian not be indignant and not protest seeing how, for the sake of criminal prepáration for a new world butchery, there is going on in certain countries a mad race for rearmament and wartime budgets are established for that purpose?

. . . . . .

Wóe to the instigators of war, if they should in the passion and blindness of the insane push the world into the abyss of a new misfortune! The blood of humanity will fall upon their heads, and not only cannot they themselves escape retribution, but even their names will be remembered through the ages with more imprecation than the names of Cain and Judas.

. . . . . .

METROPOLITAN NICHOLAS

No. 12, December, 1950

Orthodoxy and the Fight for Peace

(pp. 30-34)

. . . . . .

The unification of hundreds of millions of honest people in all the corners of the terrestrial globe around the Stockholm Proclamation—is a serious warning to the instigators of war. The flag of peace raised over the earth by the soldiers of love-of-man and uniting about itself more and more new warriors for peace, throws into a passion the leaders of hatred of humanity, who have encompassed themselves about with pride as with a necklace—according to the

Psalmsinger—and clad themselves in violence as with a garment (Psalms, 72, 6). They persecute the partisans of peace, doom them to the grievous tortures of hunger, poverty and lawlessness.

But the slaves of the money bag, the worshippers of the golden calf, will never have sufficient strength to halt the powerful pressure of the will of the international movement for peace. * * *

* * * * * * *

Imperialism, feeling the insecurity of its humanity-hating position, tries to put forth against the champions of peace, love and truth, all the powers of hell. From the so-called "cold war" it moves to acts of direct aggression, endeavoring to intimidate freedom-loving and peace-loving nations with the venom of its poisoned tusks. And although the "sons of peace" are convinced that the "sons of opposition" will never be able to shadow their brilliant hopes for peace, nor wreck the great thing they have started, however, to underestimate the entire danger which threatens humanity as a result of the intensified fanning by the Anglo-American Attilas of a third world war, would be to play into the hands of the haters of humanity.

Therefore a state of inactivity does not become the holders and champions of the idea of peace. So as to restrain the kindlers of war and to pave the way to a joyous future, to the triumph of brotherhood and love among nations, to the reign of peace and safety, it is necessary to work, work and work! Everyone who has stepped into the ranks of the soldiers of love of humanity must remember that his peace-making activity does not cease with signing the Stockholm Proclamation, but only begins, that the problem of peace does not lose its urgency and demands the twofold application of all his strength for the struggle with contemporary aggressors.

* * * * * * *

God calls upon us for special zeal in the carrying out of the Holy gospels as to love and peace to be shown at the

present time, when a certain section of people, calling themselves christians, openly acts against the great testaments of Divine Revelation and threatens humanity with new unbearable sufferings.

We have in mind those Anglo-American kindlers of a third world war. These insane people, in the spiritual blindness of the eyes of their heart, men of pride and guile, have decided upon a satanic substitution of the humanity-loving Truth of God by the vain righteousness of egoism and, forgetting that such "righteousness" is an "abomination in the sight of God" (Luke, 16, 15), have begun to extol their pretended social virtues to the entire world, to praise the false purity of their ideas and reason, and maliciously abuse other nations, marking the humanity-hating principles of fascism.

* * * * * * *

So as to be convinced of this, we can remember the statement recently published in the press of one of the American haters of humanity, Dr. Pence, rector of a university in the state of Florida. We should draw our Christian attention to this statement of this enemy of mankind if only so as to clarify in the light of God's Truth the entire depth of the moral fall of the instigators of war.

* * * While the preacher of the egoistic fascist righteousness, Dr. Pence, in opposition to God's Truth, recommends the establishment in human relations of "jungle law", the law of tusks, the "social" context of which comes to, primarily, the art of killing.

"Everyone must learn the art of killing"—Dr. Pence announces to the world, and developing the cannibalistic program, adds: "I do not think that the war (talking of a third world war, being prepared by Anglo-American fascists) must be limited to armies, military navies and military air forces or that there should be any limitations in regard to methods or weapons of destruction. I approve of bacteriological warfare, the use of gases, atomic and hydrogen bombs and intercontinental rockets. I should not ask for merciful treatment of hospitals, churches, educational

institutions or any groups of population whatsoever. It would be hyprocrisy—he states—to show mercy to any group whatever".

What is there to say about this cannibalistic program of Dr. Pence?

We live in a government full of religious freedom, in a country where, alongside with those believing in God, there are not a few citizens, denying religion. But have we ever heard from anyone, ever or anything of the kind in our country? Never and from no one! Is it not our country that marches in the forefront of the fighters for peace? Is it not she, in fact, who is the bulwark of peace in the world?—115,275,940 Soviet citizens signing the Stockholm Proclamation of the Permanent committee of the World congress of the partisans of peace—there is the convincing proof of the fact that peace is dear to us in our country, to all without exception: the young and the old, the Russian and the Tadjik, the Ukrainian and the White Russian, the Georgian and the Uzbek, the faithful and the unbeliever.

It is not thus in America * * * Of what Christian culture can one speak, listening to the cannibalistic statements of Dr. Pence? It is not Christian, this satanic culture, a culture of sharpened knives against one's nearest, the culture of the rule of ferocious exploiters, a culture which offers to the Christian world not a Christian ladder of the worker for good, climbing up which the confessor of Christ can reach the kingdom of Absolute Love and Truth, but a ladder of dead bodies, erected by a criminal will and by the hands of anti-Christian ravishers and murderers.

The humanity-hating gospel of Dr. Pence who, it should be noted, is far from alone in his fascistic arguments anent mass human self-destruction, bears upon it the clear imprint of the equally humanity-hating "philosophy" of the Nietzscheistic Zarathustra, inviting (according to Nietzsche) people of unbridled will to a bloody banquet of the destruction of people in the name of the triumph of the "super-man". It is directly to this philosophy that fascism is obligated for its birth, developing the teaching of the

"superman" into the teaching of superior races, of their world domination over all other races. The Nietzscheistic so-called cultural-ethical ideal, calling on people for self-destruction, first received practical realization on the verge of the 20th century, when the German kaiser gave his troops, on their way to Asia, the order to mercilessly exterminate the Chinese. In the days of the Second World War this idea was carried out by the madman Hitler. Presently it is the delirium of Anglo-American fascists, executing the peaceful population of Korea.

Dr. Pence is far from original in his humanity-hating expressions. The Englishman Cool, preaching the theory of the rule of great nations over small; the American Mumford, proving that "war is necessary, as a periodic organized destruction of the products of human toil", and proclaining war as "the eternal mover of history"; their cothinker the American Freeman, who calls workers "the parasitic class" and calls for their mass destruction; the Maltese Fogt, proclaiming the necessity of the annihilation of people; Arthur Case, blessing war as a "cleansing knife", with whose aid "humanity will cleanse itself of the valueless" and "will become healthy"; the Frenchman Sartre, calling the workmen of France "a stupid inert mass"—all this is the clang of the one and the same chain, the same "humanity-hating delirium, precursor of fascism—Nietzsche newly risen in the world and made use of at the need of American imperialism, becoming fascist".*

The bloody drama of the heroic Korean people, thrown into the abyss of the greatest sufferings by the treachery of the betrayer of his country, Li San Man, and the insolence of the American intervenors—is a living confirmation of the testing of the Nietzsche ideal in life. From a religious point of view the destruction of Korean cities and towns and the mass annihilation of the peaceful population of Korea by American bombardiers cannot be qualified other-

* "Questions of Philosophy", 1949, No. 3.

wise than as a satanic violation of the humanity-loving laws of Christianity.

• • • • • •

Not the atomic bombs of the parasitic exploiters will dictate to toiling humanity, responding to the interests of the workers, the structure of life, but the will of the people themselves, understanding perfectly the humanity-hating nature of imperialism and turning their face away from it more and more each day.

• • • • • •

A. Shishkin.

No. 12, December, 1950

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1948-1950

Edition of the Moscow Patriarchy, 1950.

(p. 60)

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When it was clearly ascertained that the [spear] point of the aggressor was directed against the outpost of leading and progressive mankind—the USSR, concrete problems of the struggle for peace appeared in epistles and addresses: "The Church blesses and will bless the defense of our Fatherland, for she looks upon this defense as a holy duty, as the highest expression of love for the Homeland. • • •"

The peaceful constructive work of simple people brings the richest fruit. Documents make concrete—at the First World Conference of the partisans of peace—the problems of the Church to "tear off the masks of hypocrisy and sanctimony from the face of the international highwaymer; • • • we must condemn before the entire world the criminal schemes of the dark forces of world reaction".

Standing at the head of these forces "capitalistic America is a towering fornicatrix of the reborn Babylon, having established a world market-place, tries to tempt the nations, pushing them to war". Nor do the "democrats" fall behind America, from whose camp [the democrats] breathes the smell of burning conflagrations, the stench of decomposing cadavers and the fear of a trapped criminal". The Russian Orthodox Church with all resolution "openly and in the hearing of all * * * states that the worthy, sincerely humane purposes of the Soviet Government, directed toward the happiness of the workers, and brotherly love, are wholly supported by the Russian Orthodox Church". (pp. 61-62)

* * * * * * *

When the American intervention began in Korea, the Russian Orthodox Church announced that she "cannot remain indifferent to the sufferings of the Korean people and raises her voice in the defense of truth".

* * * * * * *

PROF. N. DOCTOUSOV.

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October Term, 1952

No. 3

JOHN KEDROFF and BENJAMIN FEDCHENKOFF, as Archbishop, etc.,

Appellants,

v.

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

SUPPLEMENTAL BRIEF FOR APPELLEE ON REARGUMENT.

RALPH MONTGOMERY ARKUSH,
Counsel for Appellee.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

SUBJECT INDEX.

	PAGE
SCOPE OF BRIEF	1
STATEMENT	2
Parties and Pleadings	2
Statute Involved	2
Russian Orthodox Church	3
Old Diocese	3
Schism of the Renovated: Suppression of Patriarchate	3
Patriarchal Ukase No. 362	4
Consistory Case	4
Appointment and Purported Dismissal of Platon	5
St. Nicholas Parish and Corporation: Erection of Cathedral	5
Purported Dismissal of Platon and Appointment of Kedrovsky by Renovated Synod: Cathedral Case	6
Detroit Sobor of 1924	6
Trial of Cathedral Case and Decision at Special Term	7
Incorporation of Appellee and Transfer of Title to It by St. Nicholas' Corporation	8
Cathedral Case on Appeal	9
Reopening of Patriarchal Central Office: "Loyalty" to Soviet Regime	10
Congregational Policy Imposed on Russian Church by Government	10
Action of Court of Appeals in Consistory Case	10

PAGE.

Arrival of Benjamin in America and Demand of Pledge of "Loyalty": Interdict against Platon 11

Election of Theophilus; Interdict against Him; Adoption of Parish and Church Statutes 14

Yonkers Case 14

Failure of Negotiations with Patriarchate 15

Moscow Patriarchate an Instrument of Soviet Propaganda 19

SUMMARY OF ARGUMENT 19

ARGUMENT:

POINT I.—No federal question is involved in the presumed legislative finding that the Patriarchate in Russia is "no longer capable of functioning as a true religious body" (R. 284) 23

A. A judicial finding to similar effect would have raised no federal question 23

B. An explicit legislative finding as to the status of the Patriarchate would have raised no federal question 28

C. A legislative finding as to the status of the Patriarchate is implicit in the statute 29

D. The implied legislative finding is a state matter 35

POINT II.—No federal question is involved in the legislative mandate that religious corporations "founded and established for the purpose and with the intent of adhering to, and being subject to the administrative jurisdiction of" the the *Old Diocese* shall be and remain subject to the jurisdiction and authority of the governing organs of the *Russian Church in America* (Rel. Corps. L. §107.1) 36

PAGE

A. The validity under canon law of the action of the Detroit sobor of 1924 is a state matter 36

B. The invalidity of the interdicts placed upon Platon and Theophilus, insofar as affecting the control of property in New York dedicated to religious use, is a state matter 38

C. The invalidity of the policy of requiring "loyalty" from the American flock is a state matter 39

D. The validity of the American Church's position in rejecting all terms of reunion short of complete autonomy is a state matter 39

E. The validity of the organizational structure of the *Russian Church in America* is a state matter 40

F. The identification of the *Russian Church in America* with the *Old Diocese* is a state matter 41

G. The mandate that the properties included in the *Old Diocese* should be administered in accordance with the rules of the *Russian Church in America*, is a state matter 41

POINT III.—No federal question is involved in the award of possession to appellee 41

A. The questions of (1) Where is the beneficial title to the Cathedral? (2) Who are the members of the appellee? (3) For what purpose may the Cathedral be used? and (4) Who are the proper denominational governing authorities? —are all state matters 41

B. The award of possession to appellee does not violate the applicable "canon law" 42

C. The judgment does not prohibit the free exercise of his religion by the "canonical archbishop" 43

PAGE

D. The statute, as applied in the case at bar, no more interferes in the internal affairs of a religious body than the judgment of any court which is called on to decide a dispute over the use of church property 44

E. The statute does not outlaw the patriarchal jurisdiction from the state 44

F. The canonicity of the *Russian Church in America* and its metropolitan archbishop is the concern of appellee, not of appellants 45

POINT IV.—The judgment may be sustained on state grounds 46

CONCLUSION 46

APPENDIX A.—Religious Corporations Law, Art. 5-C, §§105, 107 47

APPENDIX B.—Translations of Extracts from Articles Published in *Journal of the Moscow Patriarchate* 50

APPENDIX C.—Selected Cases on Church Property.... 81

Table of Cases.*

	PAGE
Beauharnais *v.* Illinois, 343 U. S. 250	35
Erie Railroad Co. *v.* Tompkins, 304 U. S. 64	27
Gitlow *v.* New York, 268 U. S. 652	24
Jennings *v.* Scarborough, 27 Vroom (56 N. J. L.) 401	38
Kedroff *v.* Mt. Olivet Cemetery, *et al.*, N. Y. Supr. Ct., Queens Co., Index No.	29
Kedrovsky *v.* Rojdesvensky, 214 App. Div. 483	30
Kedrovsky *v.* Russian Catholic Church, 249 N. Y. 75	11
Patterson *v.* Colorado, 205 U. S. 454	24
Robertson *v.* Bullions, 11 N. Y. 243	26
Sims *v.* Greene, 160 F. 2d 512	44
Thomas *v.* Collins, 323 U. S. 516	35
Waipa *v.* Kushwara, N. Y. L. J. Jan. 6, 1940, 259 App. Div. 843	14
Watson *v.* Avery, 2 Bush. 332	27
Watson *v.* Jones, 13 Wall. 679	19, 20, 25, 27, 28
West Koshkonong Cong. *v.* Ottesen, 1891, 80 Wis. 62	38
West Virginia School Board of Education *v.* Barnette, 319 U. S. 624	21, 35
Zorach *v.* Clauson, 343 U. S. 306	24

* Omitting cases cited in Appendix C.

Table of Statutes.

	PAGE
Laws (N. Y.) of:	
1875, c. 97, §4	26
Religious Corporations Law (N. Y.):	
§5	28
§69.3	28
§105	36, 41
§107	4
§107.1	36, 44
§107.3	44
§169-d. 2	
§225-k	28
§295.3	28
§330.1	28

Table of Works of Reference and Other Publications.

Journal of Moscow Patriarchate 19, 50

Life, Vol. 11, No. 15, October 13, 1941 30

New York Times 32, 45

Zollman: American Church Law, 1933 24

Supreme Court of the United States

October Term, 1952

No. 3

JOHN KEDROFF and BENJAMIN FEDCHENKOFF, as Archbishop, etc.,

Appellants,

v.

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

SUPPLEMENTAL BRIEF FOR APPELLEE ON REARGUMENT.

[Emphasis in quoted matter, unless otherwise indicated, has been supplied. The abbreviations M. Br. and Ap. Br. refer to appellee's main brief, submitted on the earlier argument, and to appellants' brief on this reargument, respectively.]

Scope of Brief.

This brief is intended to supplement, and not to supersede, the brief for appellee submitted on the earlier argument. It will be limited to a discussion of the jurisdictional question which counsel were requested to include in their presentation on reargument (343 U. S. 972).

Statement.

A statement of facts, with references to the record, historical treatises and other sources and a chronological table, will be found in appellee's main brief (pp. 6-46; 111). Judge Conway's opinion in the Court of Appeals and Mr. Justice Van Voorhis' dissenting opinion in the Appellate Division also contain factual accounts which illuminate the background of the statute.

Parties and Pleadings.

In 1945, appellee, a New York religious corporation, having legal title to premises at 13-15 East 97th Street, New York City (the Cathedral), brought this action in ejectment against appellant John Kedroff as sole defendant. He was the younger son of John Kedrovsky, who had obtained possession of the Cathedral in 1926 by hoodwinking the New York courts as to his canonical status, as is now conceded by appellants. The Kedrovsky (Kedroff) family occupied the premises for nineteen years. Appellant Kedroff, when sued, made some kind of deal under which he admitted appellant Fedchenkoff (Metropolitan Benjamin) to the premises. Two years later, in 1947, Benjamin intervened as a party defendant and pleaded a right of possession based on his appointment thirteen years earlier, in 1934, as archbishop of the alleged "Archdiocese of North America and the Aleutian Islands" of the Russian Orthodox Church.

Statute Involved.

The material portions of the statute upon which the judgment appealed from is based are given in Appendix A (*infra*, p. 47).

Russian Orthodox Church.

Appellants make much of the indivisible character of the Russian Orthodox Church. The fact is, however, that, except for the ancient patriarchates and some minor sees, all of the existing autocephalous Orthodox Churches came into existence as the result of political conditions. The Russian Orthodox Church itself was formed by breaking away from the Ecumenical Patriarch after the capture of Constantinople by the Turks in 1483. Not until about 135 years later was its *de facto* autocephaly made *de jure*. "The autonomous Russian Church in America", said Mr. Justice Van Voorhis, "is following a similar course today" (Jurisd. Statement, p. 123).

After the March revolution in 1917 a sobor (convention) of the Russian Orthodox Church adopted a new, canonical and rather democratic constitution, under which the patriarch was made the chief administrative officer and the lower clergy and laity were permitted to participate in diocesan government. Diocesan sobors were provided for.

Old Diocese.

The Russian Orthodox Church existed on the North American continent first as a mission (1793-1870), then as a missionary diocese (1870-1904), then as a full-fledged diocese (1904-1924). The mission or diocese, as existing up to April 2-4, 1924, will be referred to as the *Old Diocese*.

Schism of the Renovated: Suppression of Patriarchate.

After five years of frontal attack on the Church, with the execution or imprisonment of clergy, confiscation of treasures and closing of buildings, the Bolsheviks invented

a new weapon, schism. Having arrested and imprisoned Patriarch Tikhon, the government abetted the creation of the non-canonical Renovated (Living) Church, which was permitted to hold a sobor in 1923 and to establish a central administration under a "Holy Synod". At their pseudo-sobor the Renovated officially declared "capitalism to be a mortal sin, and a battle with capitalism to be holy to Christians". During the years 1922-1927, when the government favored the schismatics, the central office of the Patriarchate was suppressed.

Patriarchal Ukase No. 362.

On November 20, 1920, while civil war was raging in the south of Russia, the supreme church administration under Tikhon issued an ukase (decree) which provided, among other things, that in case the activity of the supreme church administration should stop and it was impossible for a diocesan bishop to establish contact with the bishops of the neighboring dioceses, he should himself assume full power and organize the diocesan administration with the assistance of the existing offices (convention, council, etc.) or newly organized ones; in case the situation should acquire a protracted or permanent character, the diocese should be divided into small dioceses and form itself into a district; all measures taken locally in accordance with the present instructions and all measures taken thereafter must be submitted for confirmation later to the central church authority when re-established.

Consistory Case.

In 1918 an American priest named John Kedrovsky brought in the New York Supreme Court a representative action against a corporation known as the Archbishop and

Consistory and others, in which he obtained the appointment of a receiver. The titles to about 135 Russian Orthodox parish properties in America (not including the Cathedral) were involved in the suit (which will be referred to as the Consistory Case).

Appointment and Purported Dismissal of Platon.

Metropolitan Platon (Rojdesvensky) of Herson and Odessa was elected ruler of the *Old Diocese* at a diocesan sobor held in Pittsburgh in 1922, and Patriarch Tikhon was asked to confirm the election, which he did orally in 1922, and by a decree dated September 29, 1923 (R. 180). Four months after the date of the decree, when Tikhon had been released from prison but was confined in a monastery, seriously sick, with four doctors furnished by the government in attendance upon him, and suffering heart attacks, Tikhon and the Holy Synod (patriarchal) issued a decree, No. 28, deciding that, as they had proof that Platon had "engaged in *public acts of Counter-Revolution directed against the Soviet power* and of disastrous consequences to the Orthodox Church", he would be dismissed from the government of the *Old Diocese* from the day on which the decision was announced to him by his successor, whereupon he would be invited to come to Moscow to put himself at the disposal of the Patriarch. In Bolshevik terminology any criticism of the Soviet regime was an "act of counter-revolution."

The official announcement to Platon was not made until nine years later but the text of the decree was published in the newspapers shortly after its date, January 16, 1924.

St. Nicholas Parish and Corporation: Erection of Cathedral.

St. Nicholas parish in New York City started in 1893 as a "brotherhood and a small group." They collected money here and abroad. The Church in Russia and the

Russian government contributed substantial sums. A parish corporation (which will be referred to as St. Nicholas' Corporation) was formed in 1899 under the New York law, which at that date limited the incorporators and trustees of an Orthodox religious corporation to the diplomatic and consular representatives of the Russian government.

St. Nicholas' Corporation acquired the premises here in suit. "They started [building] in 1903, and *the church was consecrated in 1905, and was a parish church at that time*" (R. 8). Later in the same year the diocesan see was moved from San Francisco to New York and the premises became a cathedral, although no change was made in the name of the corporation. The successive ruling bishops of the *Old Diocese* occupied the Cathedral from 1905 on.

Purported Dismissal of Platon and Appointment of Kedrovsky by Renovated Synod: Cathedral Case.

In 1923 the "Holy Synod" (Renovated) purported to excommunicate Platon and appoint as ruler of the *Old Diocese* John Kedrovsky, a married man living with his wife, and to consecrate him a bishop, although traditionally Orthodox bishops are monks, who have never married or are widowers. He returned to America, armed with impressive credentials, and attempted to take over control of the *Old Diocese* and all of its properties, including the Cathedral. Litigation ensued in various states.

On March 29, 1924, Kedrovsky sued Platon and his dean in the New York Supreme Court to restrain them from occupying the Cathedral. This suit will be referred to as the Cathedral Case.

Detroit Sobor of 1924.

A sobor of the *Old Diocese* was held at Detroit on April 2-4, 1924. Various speakers referred to the recently published decree of the Patriarch, dismissing Platon, the

appointment of Kedrovsky by the Renovated Church as administrator of the diocese, the law suits with Kedrovsky, the receivership in the Consistory Case, the danger of losing the church properties, the violence being used on the ailing Patriarch. "We must create our own firm Church Administration," said one of the speakers, "completely insured against the possibility of the direct or indirect influence of the Soviet power." The terms of the patriarchal ukase, No. 362, of November 20, 1920, were distinctly referred to by a speaker who went on to point out that actualiy the *Old Diocese* for "a good many years now" had been cut off from the Patriarch.

The ensuing debate "showed the unanimous desire of the members of the Sobor to keep our American Church from Soviet interference".

The sobor, by unanimous vote or with slight opposition or abstentions, declared the temporary autonomy of the *Old Diocese*, designated Platon as ruler, resolved not to break spiritual communion with the Russian Mother Church, provided for a new constitution and left the final regulation of the relationship between the two Churches to a future sobor of the Russian Orthodox Church which would sit with the participation of representatives of the American Church *under conditions of political freedom.*

Thus was created, on the canonical basis of ukase No. 362, the administratively autonomous metropolitan district known as the Russian Orthodox Greek Catholic Church of North America, which will be referred to as the *Russian Church in America.* Its central see was the Cathedral which Platon continued to occupy.

Trial of Cathedral Case and Decision at Special Term.

The trial opened at Special Term on October 27, 1924. Platon's counsel concentrated on attacking the canonicity

of the Renovated Church and, especially, its position on married bishops. He made no attempt to base Platon's right to occupancy of the Cathedral on the resolution of the Detroit sobor of 1924. In fact these resolutions were excluded when first offered and later admitted only as bearing on "the sentiment of the diocese." Appellants' intimations (Ap. Br., pp. 6, 16) that the case represented a contest between a Moscow *appointed* prelate and a locally *elected* one are disingenuous.

Special Term (Ford, J.) ruled in favor of Platon (72 N. Y. L. J. 1211, Dec. 31, 1924), saying:

> "There is a graver consideration in the attempt of this new church, a product of the Russian dictatorship, to obtain control of a country-wide religious organization in America with hundreds of clergymen and branches scattered all over nearly all the states and having upwards of a quarter of a million members. **The property used by the Russian Church totals in value an immense sum. If the Soviet authorities can gain control of all these, what a base for their revolutionary propaganda they will have secured.**"

Incorporation of Appellee and Transfer of Title to It by St. Nicholas' Corporation.

Appellee was incorporated by special act (L. 1925, c. 463, effective April 8, 1925), which specified its object and purpose to be the acquisition, maintenance and management of a cathedral church and its appurtenances in New York City as a central place of worship of the "Russian Orthodox Church in North America", the residence of its ruling archbishop and connected religious, charitable and educational work. No mention was made in the act of the Mother Church, the Patriarchate, the *Old Diocese* or the 1917-1918 enactments.

Pursuant to authority expressly conferred by the special act, St. Nicholas' Corporation conveyed and transferred all of its real and personal estate to appellee on April 17, 1925. At the first meeting of appellee's trustees Platon expressed satisfaction that by the incorporation the Cathedral "will forever be preserved safe as a central place of worship of the whole Russian Orthodox Church in North America and seat of the Church Administration in this country".

After the transfer of title the Cathedral continued to be used as the central place of worship and administration of the *Russian Church in America* and the see and residence of its metropolitan.

Cathedral Case on Appeal.

As in the trial court, so on appeal, Platon's counsel made no attempt to base his rights on his election at Detroit or on the canonicity of the autonomous district. In fact, ukase No. 362 was not in the record. On November 27, 1925, the Appellate Division rendered an opinion, one justice dissenting, reversing the decision at Special Term (214 App. Div. 483). The majority were impressed by Kedrovsky's credentials, which are now admitted by appellants to have been false, and by the deposition of an American Methodist minister who spoke, wrote and understood no Russian but swore that the pseudo-sobor of 1923 was canonically convened. The court found, "contrary to what is now conceded to be the fact" (R. 262), that the 1923 sobor was valid and that Kedrovsky was ruler of the diocese. The Court of Appeals affirmed without opinion (242 N. Y. 547), treating the case as one involving only questions of fact on which there was evidence to sustain the findings of the Appellate Division (R. 262).

Shortly after the coming down of the decision of the Court of Appeals on March 30, 1926, Platon and his dean

left the cathedral and Kedrovsky moved in. *This was when the canonical archbishop was wrongfully ousted.*

Reopening of Patriarchal Central Office: "Loyalty" to Soviet Regime.

In 1927 the Soviet government, which had arrested the three bishops whom Tikhon before his death in 1925 had named as his successors, permitted Metropolitan Sergius, with the title of acting or substitute *locum tenens* of the patriarchal throne, to reopen the central office of the Patriarchal Church. He was required, however, to declare his "loyalty" to the regime, which he did in a public statement. He also required "loyalty" to the Soviet government from all of the Russian Orthodox clergy outside of Russia. By "loyalty" was meant refraining from criticism of the Soviet regime either in the pulpit or in the name of the Church.

Congregational Policy Imposed on Russian Church by Government.

In 1929 the government of the Soviet Republic of Russia issued an ordinance to the effect that resolutions and orders of religious conventions, conferences and their executive bodies could be carried out "only by way of voluntary execution by the faithful". This meant that no superior ecclesiastical organ was permitted to impose its commands on a local congregation.

Action of Court of Appeals in Consistory Case.

The case reached the Court of Appeals in 1928. The judgment of Special Term, unanimously affirmed by the Appellate Division, had directed that the deeds to 135 parish properties be delivered to Kedrovsky. A board of diocesan trustees, headed by Platon, was granted leave to

appeal by the Court of Appeals. As stated by Judge Conway (R. 263):

> "* * * Realizing that the legitimate claims of the North American Diocese [*Russian Church in America*], whose temporary autonomy had but recently been declared, were entitled to consideration under the circumstances disclosed, we unanimously reversed the judgments below (*Kedrovsky* v. *Russian Catholic Church*, 249 N. Y. 75)."

Arrival of Benjamin in America and Demand of Pledge of "Loyalty": Interdict Against Platon.

By ukase No. 29 of March 22, 1933, Sergius and his synod appointed Benjamin exarch to investigate the affairs of "the Russian North American Diocese" and commissioned him to take over the government of "the said Diocese upon the dismissal of Metropolitan Platon therefrom." When Benjamin arrived in America he demanded, in the name of the Patriarchate, a pledge of "loyalty" to the Soviet government from the American clergy, who refused to give it.

In June, 1933, Platon cabled Sergius asking him to bless the consecration of an American bishop. Sergius replied, demanding that Platon publish in the newspapers that he recognized Sergius as the head of the Church and was not active in "politics", that is, publicly opposing the Soviet regime. Platon refused to publish such a statement. Later he issued a declaration in which he proclaimed the *Russian Church in America* autonomous, openly opposed the Soviet regime and accused the Church in Russia of becoming a slave of the godless government and aiding it in its fight against God.

The policy of the central church authorities in Moscow to require an obligation of "loyalty" to the Soviet regime from the clergy abroad has continued to the present time.

After the American clergy had refused to give to Benjamin a pledge of "loyalty" to the Soviet government, Sergius and his synod issued an ukase, No. 61 of August 16, 1933, declaring the proclamation of the "North American Diocese" as autonomous to be null, declared schismatic "the religious group organized around Metropolitan Platon" and all of their acts invalid, decreed that Platon "as the initiator and chief author of the schism" be summoned before the Court of Bishops and charged with violation of the ancient canons, placed him under an interdict "until either he repents or the ecclesiastical court shall have rendered a decision" and proposed to the American clergy and laity that they, "breaking off from communion with those who entered into schism" should express "their submission to this present decision and their determination and promise in future to remain in the canonical jurisdiction of the Moscow Patriarchate".

This unilateral and *ex parte* action, which broke off spiritual relationship between the Mother and Daughter Churches, was taken with no advance notice, without the preferment of charges and without permitting an opportunity to Platon or the *Russian Church in America* to be heard.

By decree No. 1005 of June 29, 1934 Sergius and his synod appointed Benjamin "permanent Ruling Bishop of the Russian North American Diocese with the title of Archbishop of the Aleutian Islands and North America, also reserving to him the status of Exarch of the Moscow Patriarchate in America". This ukase recited that the acting patriarchal *locum tenens* and his synod had heard the facts concerning the refusal of Metropolitan Platon to render canonical submission to the patriarchate, and the declaration of Platon proclaiming the diocese "autocephalous",

and referred to the patriarchal ukase of January 16, 1924, dismissing Platon from the government of the North American diocese because of his "acts of counter-revolution directed against the Soviet power" and summoning Platon to Moscow (*supra*, p. 5). The ukase also referred to the decisions of March 22, 1933, and August 16, 1933, above mentioned. The ukase also referred to the verbal proposal of the acting *locum tenens* the opening words of which were stated as follows: "His Eminence, the Exarch in America, reports that he has organized in New York a Diocesan Council and that **our North American Diocese has begun official existence.**" As Judge Conway said (R. 265), this "would seem to be a significant admission that the former North American Diocese, which had by that time become a metropolitan district, had achieved practical administrative autonomy and that it was necessary for the Russian church to organize a new diocese" (which will be referred to as the *New Patriarchal Diocese*). After these recitals the ukase decreed the appointment of Benjamin as above mentioned and confirmed the establishment by the exarch of a diocesan council.

Despite these decrees of the Patriarchate and its attempt to set up its own diocesan organization in America, the American parishes remained loyal to Platon. Benjamin testified that 50 parishes recognized him as ruling bishop, but he failed to identify them although he promised to do so and there is ground to consider his claim exaggerated. *In any event there is no proof that a single one of his parishes was in existence at the time of the 1924 Sobor or at the time of his arrival in this country.* They may all have been founded since then.

Election of Theophilus; Interdict Against Him; Adoption of Parish and Church Statutes.

A sobor was held at Cleveland on November 20-23, 1934, reaffirmed the autonomy of the *Russian Church in America*, elected Theophilus (Pashkovsky), then Bishop of Chicago, to be metropolitan and ruling bishop in place of Platon, who had died, and adopted certain statutes for the administration of parishes known as the normal parish statutes.

On January 4, 1935 (R. 228) an interdict like that which had been placed upon Platon "for similar conduct" was issued against Theophilus by the Patriarchate.

At a sobor held at New York on October 5-8, 1937, the autonomy was again affirmed and statutes for the administration of the Church were adopted.

Yonkers Case.

In 1940 the status of the *Russian Church in America* again came before the Court of Appeals on a motion for leave to appeal from the decision in *Waipa* v. *Kushwara*, 1940, 2d Dept., 259 App. Div. 843. In a suit brought to compel a priest to comply with an order of Metropolitan Theophilus transferring him from a church in Yonkers, New York, to another parish, he defended on the ground, among others, that Benjamin as appointee of the patriarchate, and not Theophilus, had authority here. The lower courts rejected this contention, finding authority for the creation of the *Russian Church in America* in patriarchal ukase No. 362 of November 20, 1920, which was to continue "until such time as the existing civil authorities • • • would cease interfering with the church" (N. Y. L. J., Jan. 6, 1940, p. 97, col. 5). The Court of Appeals denied leave to appeal (283 N. Y. 780).

Failure of Negotiations with Patriarchate.

When Sergius, who had finally, in 1943, been permitted by the Soviet government to assume the office of Patriarch, died in 1944, the *Russian Church in America* sent a telegram of condolence to the patriarchal *locum tenens* which was courteously acknowledged on behalf of the Holy Synod. Then the *Russian Church* in America was invited to send delegates to an All Russian Sobor to be held in Moscow in January, 1945. The delegates chosen by Theophilus were a bishop, two priests and a layman. The Soviet government visaed their passports and offered the use of a military plane from Alaska to Moscow. Later the visa on the layman's passport was cancelled and the military plane that was carrying the bishop and one of the priests put them down in the middle of Siberia. They had to take a train and arrived ten days late for the Sobor, at which the present Patriarch, Alexy, had already been elected. They appeared before the Synod, rendered a full report in writing on the condition of the *Russian Church in America* and a written request for the lifting of the suspension on appropriate terms of autonomy. A few days later, without having opportunity for discussion, they were handed an ukase by the Patriarch.

The ukase prescribed certain conditions for the lifting of the suspension, among which was the formation of a new district covering all of the American hemisphere, the convocation of an American sobor "consisting of all the bishops, representatives of the clergy and laymen of the **present exarchate headed by Metropolitan Benjamin as well as of the Metropolitan District headed by Metropolitan Theophilus**". The sobor was to elect a metropolitan, subject to confirmation by the patriarchate; as candidates the patriarchate recommended Benjamin and also the arch-

bishop who was being sent from Russia to preside over the sobor. Although Benjamin had advised the Patriarch, just prior to his election that **an essential condition of reunion between the Mother Church and the *Russian Church in America* was the fullest loyalty to the Soviet power** but that he did not think that the *Russian Church in America* would accept that condition, the ukase also stipulated that the sobor in the name of the *Russian Church in America* "declares its abstention from political activity against the USSR and gives corresponding orders to all parishes".

The ukase also stated that the metropolitan-exarch of the American district, together with the council of local bishops, "may be given some extended powers by the Moscow Patriarchy, but the right to reward the clergy with higher titles, and the right of appeal as regards bishops, clergy and others, remain with the Moscow Patriarchy."

The ukase was rejected by the bishops' council of the *Russian Church in America* at a meeting held on May 22-24, 1945. The metropolitan council later issued an official statement explaining the rejection. In commenting on the demand for renunciation of political activities against the USSR, the statement said:

> "* * * the Russian Church in America exists in an atmosphere of religious and political freedom. Every citizen of the United States and of Canada has the right of freedom of speech. He may criticize his own government or any other government, so long as he does not go beyond certain limits which have been fixed by statute or decisions of the courts. It would be inconsistent with the duties and obligations of loyal American and Canadian citizens, and contrary to the traditional atmosphere of freedom of speech and political action in these countries, for

the [*Russian Church in America*] to give the pledge of loyalty to a foreign power which is implicit in the demand of the Patriarchal Ukase."

As to the holding of an election of a metropolitan the metropolitan council saw no justification, there being no present vacancy in the office.

The statement ended as follows:

"The [*Russian Church in America*] has sympathized with its mother church in all of her trials and tribulations. It has rejoiced in the privileges which have been recently accorded to her. But there must be further discussion and clarification of the relationship between the two churches. Why was the [*Russian Church in America*] invited to send representatives to the Sobor of January, 1945? Was it so that they might attend the Sobor? Then why was the visa of the lay representative cancelled and why were the two clerical representatives who made the trip not permitted to arrive in time for the Sobor? Why were those representatives not given an opportunity to discuss the conditions of the Ukase but merely handed the completed document for delivery to Metropolitan Theophilus? It was an arduous journey for them to make if their function was only that of couriers. The Ukase might more economically have been brought here by Exarch Benjamin, who went to Moscow and was present at the Sobor.

The substance of the Ukase, as well as its tone and all of the circumstances leading up to and surrounding the issuance of the Ukase, suggest the high-handed methods of an autocratic bureaucracy. The [*Russian Church in America*] is flourishing in the atmosphere of democratic freedom. It was no fault of the American branch of the Russian Orthodox Church that by force of circumstances it was compelled to establish its own church administration. It was no fault of the [*Russian Church in America*] that

the Patriarchate laid a suspension on it because its clergy declined to give a pledge of loyalty to the Soviet power.

It is an American Church and an American Church it must continue to be."

In September, 1945, an archbishop, Alexis, came to the United States as an ambassador from the Patriarch. Appellant Kedroff, who had already been sued in this action, requested and received reordination at the hands of Benjamin and the patriarchal envoy and admitted them to the Cathedral in about October, 1945.

At a sobor held at Cleveland in November, 1946, the *Russian Church in America* resolved that the Patriarch "be requested to continue us in his fold and be our Spiritual Head, conditioned upon the Church in America retaining its present autonomous status and the right of self government"; that the periodic All American Sobors should remain the supreme legislative and administrative body of the Church; at those sobors the Church should continue to elect its own metropolitan and make and adopt its own laws by which the Church is governed; that in the event that the aforesaid conditions were found not to be acceptable to the Patriarch, the Church should continue self-governing until such time as the Patriarch should find it possible to accept the conditions stated in this resolution.

In response to a cable giving him the substance of this resolution, the Patriarch cabled Theophilus that on principle he had no objections against autonomy for "our Orthodox Church in America" and was commissioning Metropolitan Gregory of Leningrad to discuss all questions with Theophilus. Gregory, however, did not succeed in his mission as he testified at the trial that the *Russian Church in America* was still under suspension.

Moscow Patriarchate an Instrument of Soviet Propaganda.

The Patriarchate has thrown itself with enthusiasm into the "Hate America" campaign of the Soviet government. For the last several years the official publications of the Patriarchate have been engaged in heated attacks on the United States and definitely mixing in lay politics. Annexed to appellee's main brief (Appendix C, pp. 118 *et seq.*) will be found translations of extracts from the official Journal of the Moscow Patriarchate. More recent material of this nature is given below (Appendix B, *infra*, p. [illegible]). This shows that Metropolitan Nicholas of Krutitsk and Kolomen, the second ranking dignitary in the Patriarchate, has been particularly active as a Soviet propagandist in speech and writing, *in the name of the Church*. The policy of "refraining from politics only * * * in the name of the Church" testified to by Benjamin, evidently applies only to adverse criticism of the Soviet regime, not to the official Soviet "line".

Summary of Argument.

No federal question is involved in the presumed *legislative* finding that the Patriarchate is "no longer capable of functioning as a true religious body." A *judicial* finding to this effect would raise no federal question. The adjudication of disputes over church property is a service rendered to the Church by the State, like police or fire protection of church properties: it does not breach the traditional wall of separation. The two-fold doctrine of *Watson* v. *Jones* is not imbedded in the federal constitution. Whether, to what extent and subject to what modifications and qualifications the doctrine—comprising the rules of denominational control and of the conclusiveness of decisions of

ecclesiastical tribunals—is to be applied to church property cases, is exclusively a state matter.

In order to be in a position to apply the doctrine of *Watson* v. *Jones* in the present case—in the absence of the statute—the trial court would have had to determine the status of the Patriarchate in Russia, again a state matter.

An explicit legislative finding as to the status of the Patriarchate would have raised no federal question. This would have been pertinent to a legislative determination as to the applicability of the *Watson* v. *Jones* doctrine in a general class of court cases likely to arise in the future. The New York courts had been plagued with lawsuits over Russian Orthodox church properties. The decisional law (Yonkers Case), while favorable to Theophilus as against Benjamin, was in an unsatisfactory condition. A formal legislative investigation and explicit finding would have been in order.

A legislative finding as to the status of the Patriarchate is implicit in the statute. The Court of Appeals properly resorted to presumption. The imprisonment of Tikhon and emergence of the Renovated Church forced the *Old Diocese* to set up an autonomous organization. The birth, life and death of the Renovated Church are striking evidence of the complete control of church activities by the Bolsheviks. The requirement of "loyalty" to the Soviet regime was proven by Benjamin's own testimony. The 1927 declaration of the Russian bishops has not been lived up to in practice. There is ample evidence in the record to support the presumption of a legislative finding as to the status of the Patriarchate in Russia. Also there is the general knowledge that no organization is free in the Soviet Union. And since the trial below the Patriarchate has brazenly assumed an active role in the Soviet propaganda apparatus. The presumption is not forbidden by the policy

expressed in *West Virginia School Board* v. *Barnette*. Since, as shown, an explicit finding would have involved no federal question, the presumed finding is a state matter exclusively.

No federal question is involved in the legislative mandate. The validity of the action of the 1924 sobor at Detroit is a state matter. In the absence of the statute the trial court would have properly inquired into that matter. The legislature found explicitly the creation of the autonomous metropolitan district, based presumably on the patriarchal ukase No. 362. The statute was declaratory of the decisional law as declared in the Yonkers case. In this respect both that case and the statute concerned a state matter.

Findings to the effect that the interdicts placed on Platon and Theophilus were invalid, insofar as affecting the control of property in New York dedicated to religious use, are implicit in the statute and are state matters. Such invalidity would follow from the validity of the autonomy and the incapacity of the Patriarchate. Also, there was no Court of Bishops in America and trips to Russia would have been suicidal.

The invalidity of the policy of requiring "loyalty" from the American flock is a state matter, as is the validity of the American Church's position in rejecting all terms of reunion short of complete autonomy.

The validity of the organizational structure of the American Church, described in the statute, is a state matter, as is also the explicit finding by the legislature that the *Russian Church in America* is identical with the *Old Diocese*.

The mandate that the properties included in the *Old Diocese* should be administered in accordance with the rules

of the *Russian Church in America* inevitably follows from the undergirding findings of fact, explicit or implicit, and is a state matter.

No federal question is involved in the award of possession to appellee. The questions of (1) Where is the beneficial title? (2) Who are the members of appellee? (3) For what purpose may the Cathedral be used? (4) Who are the proper denominational governing authorities?—are all state matters.

The award of possession to appellee does not violate the applicable "canon law". Of the two alleged rules relied on by appellants, viz.: (1) the ruling bishop of "the American Archdiocese" is appointed by the Patriarchate and (2) the ruler of "the American Archdiocese" has the prerogative of occupying the Cathedral—the first is irrelevant and the second begs the question which was passed on by the legislature to the contrary effect.

The judgment does not prohibit the free exercise of his religion by the "canonical archbishop". The "canon law" determined by the legislature, as a state matter, to be applicable is the body of administrative statutes adopted by the sobors of the *Russian Church in America*. Pursuant to those statutes the "canonical archbishop" is elected by the American sobor. The judgment enables him to serve in the Cathedral. No federal question is involved.

The statute, as applied in the case at bar, no more interferes in the internal affairs of a religious body than the judgment of any court which is called on to decide a dispute over a church property.

The statute does not outlaw the patriarchal jurisdiction from the state. The Patriarchate is free to found or take under its control any Russian Orthodox churches in New York provided that they did not form part of the *Old Diocese* or the *Russian Church in America*.

The canonicity of the American Church is not the concern of appellants.

The judgment may be sustained on state grounds. The opinions of the majority in the Court of Appeals were mainly devoted to describing the factual background as an aid to construction. The federal question was insubstantial. This Court is not bound by the certificate of the state court that the federal question was necessarily passed on.

ARGUMENT.

POINT I.

No federal question is involved in the presumed legislative finding that the Patriarchate in Russia is "no longer capable of functioning as a true religious body" (R. 284).

A. A judicial finding to similar effect would have raised no federal question.

Since the foundation of the Republic, state and federal courts have been adjudicating disputes over the control of property dedicated to religious uses. In Appendix C. (*infra*, p. 81) will be found citations of a number of such cases selected from state and federal jurisprudence.[1]

So far as known, this is the first time the suggestion has been made that for a court to pass on such a dispute

[1] The cases cited involved the canon law or traditional polity of more than two score denominations, such as Cumberland Presbyterian, Presbyterian U. S. A., Finnish Lutheran, German Lutheran, Norwegian Lutheran, Swedish Lutheran, Icelandic Lutheran, Methodist Episcopal South, Methodist Episcopal, Methodist Protestant, African Methodist Episcopal, A. M. E. Zion, Baptist, Episcopal, Disciples (Christian or Church of Christ), Evangelical, Reformed, Friends, Shakers, Congregational, United Brethren, Church of God, Pentacostal, Pilgrim Holiness, Russian Orthodox, Syrian Antiochean Orthodox, Carpatho-Russian Orthodox, Roman Catholic of Ruthenian Rite (Uniate), Roman Catholic (Latin Rite), etc.

and award the use of church property to one of the litigants, would abridge the religious freedom of the losing party. While it is true that some of these cases antedated the adoption of the Fourteenth Amendment (1868) and many of them antedated the first explicit reading of the First Amendment into the Fourteenth (*Gitlow* v. *New York*, 1925, 268 U. S. 652, 666, citing dissent of Harlan, J., in *Patterson* v. *Colorado*, 1907, 205 U. S. 454, 462, and subsequent decisions), yet all of the state constitutions contained guaranties of religious freedom at the time when these cases were decided.

If the losing litigant in every church property case may raise a federal question under the First and Fourteenth Amendments, this Court will be flooded with cases of that description, of which there seems to be no ending (see topic "Religious Societies" in current digests; also, Zollman, American Church Law, rev. ed., 1933, cc. v-viii).

But, obviously, the adjudication of a church property case neither respects "an establishment of religion" nor impinges on "the free exercise thereof." Surely, all of the Justices of this Court, including those who dissented in *Zorach* v. *Clauson*, 343 U. S. 306, would agree that religious societies and their members may resort to the courts when they cannot settle otherwise their disputes over the use of church property. This, like police or fire protection of church properties, is a public service which the State renders to the Church and is peculiarly appropriate to the State's position as supreme guardian of property devoted to a charitable use (M. Br., pp. 53-54). The rendition of this service does not breach the traditional wall of separation. As was said by this Court, in a case where federal jurisdiction was based on diversity of citizenship,

"• • • Much as such dissensions among the members of a religious society should be regretted, a regret which is increased when passing from the control of the judicial and legislative bodies of the entire organization to which the society belongs, an appeal is made to the secular authority; the courts when so called on must perform their functions as in other cases.

Religious organizations come before us in the same attitude as other voluntary organizations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints. • • •"

Watson v. *Jones*, 1871, 13 Wall. 679.

If, then, the judicial determination of disputes over church property is not *ipso facto* an intrusion into a forbidden field, the question arises—under what peculiar restraints, if any, are the courts subjected by the First and Fourteenth Amendments in this class of cases?

Appellants state categorically that "*Watson* v. *Jones* is part of the Constitution" (Ap. Br., p. 32). Judge Conway's opinion states that the rule of denominational control "is by no means a constitutional doctrine • • •" (R. 280).

The latter view is, it is submitted, the correct one. Whether, and to what extent, and subject to what modifications and qualifications, the doctrine of *Watson* v. *Jones* is to be applied to church property cases, is exclusively a state matter.

The doctrine is, in reality, two-fold, embracing (1) denominational control and (2) conclusiveness of ecclesiastical decisions.

So far as concerns *denominational control* of incorporated societies, there would appear to be no constitutional question.

When in New York, prior to 1875, the members of a local parish were incorporated they accepted the corporate franchise with the understanding that the by-laws of their own corporation, and not the rules of the general denomination, were to govern the administration of the property, in case a dispute were to arise and be submitted to the courts (*Robertson* v. *Bullions*, 1854, 11 N. Y. 243). This situation, of course, did not prevent the governing organs of the denomination from enforcing ecclesiastical discipline against the local congregation for violation of the general denominational rules (*ibid.* at p. 264).

Had this situation not been altered by statute (L. 1875, c. 97, §4, now Rel. Corps. L. §5), the courts of New York today would not be constrained by the federal constitution to impose denominational control on religious corporations. It would be a state question only.

So far as concerns *conclusiveness of ecclesiastical decisions*, the question of whether *Watson* v. *Jones* must be followed is non-federal. A reading of the majority opinion in that case discloses that on this branch of the doctrine the Court based its conclusion on (1) the implied consent of the members to the ecclesiastical government, i.e., the principle of *arbitration* and (2) the greater competence of ecclesiastical tribunals, i.e., the principle of judicial economy or *convenience* (13 Wall. at p. 729). While it is true that Mr. Justice Miller referred to "a broad and sound view of the relations of church and state under our system of laws" (*ibid*, at p. 727), he does not indicate that the opposite conclusion from that reached by the Court would have respected "an establishment of religion" or prohibited "the free exercise thereof."

(Ironically enough, the case would have been decided differently had *Erie Railroad Co.* v. *Tompkins,* 1938, 304 U. S. 64 been decided before *Watson* v. *Jones;* for the Court of Appeals of Kentucky had previously held that the competence of the ecclesiastical tribunal could be inquired into [*Watson* v. *Avery,* 1867, 2 Bush. 332] but this Court refused to adopt that view [13 Wall. at pp. 732-734].)

For purposes of argument, let it be supposed that the present case had been tried without reference to Article 5-C. Assuming that the doctrine of *Watson* v. *Jones* would have been *prima facie* applicable, the trial court would have been confronted with the following questions:

(*a*) Was patriarchal ukase No. 28 of January 16, 1924, purporting to dismiss Platon for "public acts of Counter-Revolution" (R. 223), without a hearing, and signed by Patriarch Tikhon while sick and under house arrest (R. 181), such a decision by a church tribunal as to be binding on a civil court?

(*b*) Did the suppression of the patriarchal central office during 1922-1924 constitute such a break in communication with the *Old Diocese* as to justify the creation of an adminstratively autonomous district pursuant to patriarchal ukase No. 362 of November 20, 1920?

(*c*) Is the policy of the Patriarchate to require an obligation of "loyalty" to the Soviet regime from the clergy abroad open to question in a civil court?

(*d*) Are the patriarchal decrees placing Platon and Theophilus under interdict, without hearings before a Court of Bishops, binding on a civil court in a case involving the right to control property?

(*e*) Is the patriarchal ukase No. 98 of February 16, 1945, laying down terms of reunion, binding on a civil court?

Each of these questions would have involved a determination as to the extent to which, and the modifications and qualifications subject to which, the doctrine of *Watson* v. *Jones* was to be applied. That, as has been shown, is a state matter. The court would not have been prevented by the First and Fourteenth Amendments from finding an answer to each of these questions.

Obviously the answer in each instance would have been found in the status of the Patriarchate from 1922 to the date of trial. Without a finding on that subject the trial court would not have been in a position to apply the doctrine of *Watson* v. *Jones*.

It follows that a judicial finding that the Patriarchate was "no longer capable of functioning as a true religious body" would have involved no federal question.

B. An explicit legislative finding as to the status of the Patriarchate would have raised no federal question.

Let it be supposed that the legislature had held hearings on the subject and made an explicit finding to the effect that the Patriarchate was "no longer capable of functioning as a true religious body". This would have been pertinent to a determination as to whether, and to what extent, and subject to what modifications and qualifications, the doctrine of *Watson* v. *Jones* was to be applied in a general class of cases, viz.: disputes over the control of church properties in the State of New York which had been part of the *Old Diocese*. The legislature had prescribed that the property of all religious corporations should be administered subject to denominational control (Rel. Corps. L. § 5) and, in the case of particular denominations had enacted additional explicit instructions to similar effect (*ibid.* §§ 69:3, 169d.2, 225k, 295.3, 330.1). As to the Russian Orthodox church properties, however, the

general rule was not sufficient. In case of litigation over a local church property how was a New York court to know whether the decisions of the Patriarchate or of the *Russian Church in America* were to govern? True, in the Yonkers case (*supra*, p. 14) the courts had sustained the authority of Theophilus, as against Benjamin, over a local church property on the basis of the patriarchal ukase, No. 362, of November 20, 1920. But, according to that case, the efficacy of the ukase was to continue only "until such time as the existing civil authorities * * * would cease interfering with the church" (N. Y. L. J., Jan. 6, 1940, p. 97, col. 5). That left the state law in an unsatisfactory condition, for it would still be necessary in every individual case to introduce proof as to the then current state of affairs in Russia—practically an impossible task for a litigant not favored by the Soviet government. Frequent litigation was likely to occur in the future; in fact, the New York courts, prior to 1945, had been plagued with lawsuits over Russian Orthodox church properties (M. Br. p. 94 second footnote[2]). Under those circumstances a formal investigation and explicit finding by the legislature would have been in order and would have raised no federal question.

C. A legislative finding as to the status of the Patriarchate is implicit in the statute.

In the absence of a formal inquiry and explicit finding by the legislature, the Court of Appeals properly resorted to presumption. Judge Conway's discussion of the subject (R. 281-284) cannot be improved on and need not be paraphrased.

Appellants' objections (Ap. Br. pp. 36-44) to Judge Conway's reasoning may be disposed of briefly.

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[2] In addition to the cases referred to in the footnote, mention may be made of the unreported case of *Kedroff* v. *Mt. Olivet Cemetery, et al.*, N. Y. Supr. Ct., Queens Co., Index No. 1195/1941.

Appellants dismiss as "fantastic" (Ap. Br. p. 36) the imprisonment of Tikhon and the emergence of the Living (Renovated) Church[3] as bearing on the status of the Patriarchate. But these were the very facts that forced the *Old Diocese* to set up an autonomous organization in order "to keep our American Church from Soviet interference" (R. 186). From the imprisonment of Tikhon until 1927 the central office of the Patriarchate was suppressed; certainly during that period the Patriarchate was not "capable of functioning as a true religious body."

Appellants have very little to say about the Renovated Church but lean heavily on *Kedrovsky* v. *Rojdesvensky*, 1925, 214 App. Div. 483; aff'd, 1926, 242 N. Y. 547 (Cathedral Case), where the appellate courts had been misled into believing that a schismatic sect—fostered by the Soviet government, preaching "capitalism to be a mortal sin, and a battle with capitalism to be holy to Christians" (R. 257)—was the true Church of Russia and its representative the canonical archbishop of the *Old Diocese*. As Judge Conway points out, the findings of the Appellate Division in the Cathedral Case were "contrary to what is now conceded [by the present appellants (R. 163-164)] to be the fact" and the "control of all phases of Russian life by the Government was not as apparent in 1924 as it is a quarter of a century later" (R. 262). And when the Cathedral Case "was in the courts," remarks Mr. Justice Van Voorhis, "it evidently did not suit the purposes of the ruling power in Russia to furnish evidence to establish the lack of canonicity of the group which succeeded in that lawsuit" (Jurisd. Statement, p. 111).

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[3] Appellants say (Ap. Br., p. 36) that the Living Church disappeared in 1925. According to the news photographer Margaret Bourke-White, who visited Russia in 1941, the schismatic church was still in existence and totaled "perhaps 10% of all the pious in the U. S. S. R." (Life, vol. 11, No. 15, October 13, 1941).

The birth, life and death of the Renovated Church are striking evidence of the complete control of church activities by the Bolsheviks. When it suited their purposes they set up that Church and successfully used it to pull the wool over the eyes of the New York courts. When the Renovated Church had fulfilled its purpose, it was thrown into the ash can; and appellants now concede that it was illegal from the start. Yet, in the face of that concession, the defense in the present case is an attempted repetition of the Kedrovsky business: it is as monotonous as a newsreel that we have all seen before; here we are back where we first came in.

As to the "loyalty" pledge appellee stands squarely on the testimony of Metropolitan Benjamin himself (M. Br., pp. 62-66) as well as other evidence in the record (R. 211; 228). Appellants seek to reconcile the demands of "loyalty" with the Christian tradition of rendering "to Caesar the things that are Caesar's, and to God the things that are God's" (Mark 12:17). But they do not explain why "a Church of American citizens" (R. 150) should be "loyal" to Stalin!

Appellants print as an appendix to their brief on reargument a declaration of the Russian bishops published in 1927 (Ap. Br., pp. 40, 67-70) as proving the independence of the Patriarchate. This is a high minded document, admirable in every respect. The only trouble is that in actual practice the precepts in this document have not been lived up to. For example the message says (Ap. Br., p. 67):

> "• • • The Church also stands aloof from the political organization of authority, for it is loyal to the governments of all the countries within the limits of which it has its own members. It lives at peace with all the different types of state organization, beginning with such despots as were formerly in

> Turkey and ending with such Republics as the North American United States. * * *"

Those were fine words in 1927. But they sound hollow today, compared with the fiery attacks on the United States which have been published in the official journal of the Patriarchate (*infra*, p. 50; M. Br., p. 118) and the testimony of Benjamin that "loyalty" to the Soviet regime is still required of the American faithful. When two Caesars are in the position of the United States and Russia today no Christian can be loyal to both.

The 1927 message also said (Ap. Br., p. 68):

> "* * * The Church wants religion to flourish. Communism wants it to perish. With such deep difference in fundamental principles separating the Church and State, it becomes impossible that an inner nearness or reconciliation could exist between them. * * *"

Again brave words had to be eaten, as shown by the following article in The New York Times of August 7, 1949:

> "Moscow, Aug. 6—Alexius, Orthodox Patriarch of Moscow and all Russia, declared today that the excommunication of all persons supporting Communism 'would fundamentally contradict the main tenets of the orthodox Christian faith.'
>
> Alexius' statement was published in Izvestia, the Government newspaper, along with a series of questions eliciting it that had been submitted by a Reuter's news agency correspondent in Moscow.
>
> **Alexius furthermore declared there could be no conflict between loyalty to the Soviet state and loyalty to the Russian Orthodox Church.**
>
> 'Such a conflict,' he said, 'not only does not exist but also cannot exist if believing people will adhere

to the precise meaning of the evangelical commandments and testaments of the Apostles.'

* * * * * *

The declaration by the Patriarch of Moscow on the question of a conflict between the Soviet state and the church asserted that 'to this question there can be only one answer.' This was reminiscent of a statement by Alexius somewhat more than a year ago when, on being asked whether there was any conflict between the theory and practice of communism on the one hand and religious belief on the other, he replied: **'The Orthodox Church has no conflicts whatsoever within the Soviet state.'**

At that time he declared that freedom of religion was guaranteed by the Soviet Constitution, that the number of churches was increasing and that 'from Stalin the church has received a favorable support on all church questions that arise.'

* * * * * * *"

There is ample evidence in the record to support the presumption of a legislative finding as to the status of the Patriarchate, including, among other items, the following:

(*a*) The frontal attack on religion by the Bolsheviks in the early years after the Revolution (R. 46-47);

(*b*) The arrest and imprisonment of Patriarch Tikhon (R. 47-50);

(*c*) The Renovated Schism (R. 50-56; 256-257);

(*d*) The confinement of Tikhon in a monastery after his release from prison (R. 57);

(*e*) The decree dismissing Platon for "acts of Counter-Revolution" extracted from the ailing Patriarch (R. 223-224; 181);

(*f*) The appointment of Kedrovsky as ruler of the American diocese (Cathedral Case record, fols. 1673-1674);

(*g*) The suppression of the Patriarchate from 1922 to 1927 (R. 80);

(*h*) The arrest of the three *locum tenentes* named by Tikhon (R. 57);

(*i*) The requirement of "loyalty" from Sergius (R. 80);

(*j*) The refusal to permit the election of a Patriarch until 1943 or the holding of an All Russian sobor until 1945 (R. 107);

(*k*) The imposition of a congregational polity on the Church in Russia (R. 58-59);

(*l*) The demands of "loyalty" made by Sergius and Benjamin on the American clergy (R. 113-114; 117; 125; 211; 228);

(*m*) The appointment of Benjamin as patriarchal exarch and archbishop and the establishment of the *New Patriarchal Diocese* (R. 223-225);

(*n*) The revocation of the visa on the passport of the lay delegate to the 1945 Moscow sobor and the putting down of the clerical delegates' plane in Siberia[4] (R. 212-213);

(*o*) The failure of the Patriarchate to give the American delegates an opportunity for discussion (R. 213);

(*p*) The terms of the patriarchal ukase, No. 98, of February 16, 1945 (Def. Ex. D, R. 227; 213-214);

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[4] Benjamin testified that the delegates arrived "a day late" for the sobor (R. 126), but both of the delegates, Bishop Alexy and Fr. Dzvonchik (R. 212), participated in the official announcement (Pl. Ex. 16) which stated that they arrived in Moscow *ten days* after the sobor had adjourned (R. 213).

(q) The refusal of the Patriarch to concede full autonomy to the *Russian Church in America* (M. Br., pp. 43-44).

Outside of the record, of course, is the general knowledge that no organization is free in the monolithic Soviet state. And since the trial below the Patriarchate has brazenly assumed an active rôle in the official Soviet propaganda apparatus (M. Br., pp. 45-46; 118, *et seq.*; *infra*, pp. 50, *et seq.*).

Appellants' arguments that the request for reunion in 1946 was a recognition of the free status of the Patriarchate are sufficiently answered by Judge Conway (R. 273-274) and Mr. Justice Van Voorhis (Jurisd. Statement, pp. 100-102).

Appellants' references to Article XV and §15(3) of the Religious Corporations Law, and Governor Dewey's speech at Buffalo in 1943, have been already dealt with (M. Br., pp. 103-105).

Finally, appellants rely on *West Virginia School Board of Education* v. *Barnette*, 1943, 319 U. S. 624 and *Thomas* v. *Collins*, 1945, 323 U. S. 516 as forbidding presumptions in a religious freedom case. But in both those cases there were admittedly legislative restrictions on liberties protected by the First Amendment, while the statute here is not of that category. Also, there seems to be some doubt as to whether the distinction made in those cases is still valid (see dissent of Black, J., in *Beauharnais* v. *Illinois*, 1952, 343 U. S. 250, 269).

D. The implied legislative finding is a state matter.

It has already been shown that an explicit finding would have involved no federal question (*supra*, p. 28). The same holds true as to the implicit finding.

Accordingly, the presumed legislative finding that the Patriarchate in Russia is "no longer capable of functioning as a true religious body" is a state matter exclusively.

POINT II.

No federal question is involved in the legislative mandate that religious corporations "founded and established for the purpose and with the intent of adhering to, and being subject to the administrative jurisdiction of" the *Old Diocese* shall be and remain subject to the jurisdiction and authority of the governing organs of the *Russian Church in America*. (Rel. Corps. L. §107.1).

A. The validity under canon law of the action of the Detroit sobor of 1924 is a state matter.

Just as the state and federal courts examined the powers of the general assemblies of the Cumberland Presbyterian Church and the Presbyterian Church U. S. A. to effect a merger (M. Br., p. 93n), so here, in the absence of the statute, it would have been proper for the trial court to inquire into the validity of the action of the Detroit sobor of 1924. No federal question would have been involved.

Here there is an explicit legislative finding. The legislature described the *Russian Church in America* as "an administratively autonomous metropolitan district created pursuant to resolutions adopted at a general convention (sobor) of said district held at Detroit, Michigan, on or about or between April second to fourth, nineteen hundred twenty-four" (Rel. Corps. L. §105). The presumed canonical basis of this finding was the partiarchal ukase, No. 362, of November 20, 1920.

Appellants bluntly assert that the autonomy was not declared pursuant to the ukase (Ap. Br., p. 18n9). The evidence[5] is to the contrary (R. 185). Judge Froessel says that the "American sobors * * * invoked the ukase of 1920" (R. 285). Judge Conway says that at the sobor of 1924

> "It was pointed out that the North American Diocese, for a good many years, had been 'cut off from the highest organ of the administration of the Russian Church' and that that situation made operative the above quoted ukase of 1920 providing for local administration and election of bishops * * *" (R. 261).

Appellants also remark that "the district did *not* rely on this order [ukase No. 362] in the *Kedrovsky* trial in 1924—a most strange omission if the autonomy had been based on it" (Ap. Br., p. 18n9). Appellants ignore the fact that the Cathedral Case was started before the Detroit Sobor and was tried on the basis of the situation existing at the commencement of the action. Although appellants consistently try to give a different impression (Ap. Br., pp. 6, 16, 18n9), the truth is that in the Cathedral Case the sole issue was whether Kedrovsky or Platon was the canonically *appointed* archbishop; the only reference to the *election* of Platon at Detroit was to show recognition of his appointment (M. Br., pp. 24, 29).

The Yonkers Case confirmed the validity of the 1920 ukase as the basis of autonomy (*supra*, p. 14). Article 5-C, therefore, was declaratory of the decisional law as it existed at the time of enactment. Both the decision and the statute, in this respect, concerned a state matter.

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[5] By an error of the speaker, the reporter or the translator, the date 1921, instead of 1920, appears in the minutes. Also the ukase is referred to as a "circular letter." But the substance of the speaker's remarks shows indubitably that he was referring to ukase No. 362.

B. The invalidity of the interdicts placed upon Platon and Theophilus, insofar as affecting the control of property in New York dedicated to religious use, is a state matter.

Findings to the effect that the interdicts were invalid are implicit in the statute. Their invalidity would follow from the findings that the autonomy was valid and that at all times since the date of the autonomy the Patriarchate has not been capable of functioning as a true religious body. It also may be pointed out—a fact not noted in the opinions below—that under ancient canon law the interdicted bishops were entitled to a trial before a Court of Bishops (R. 120-122). There was an insufficient number of bishops in the United States to try Platon (R. 139), so that he would have had to go to Moscow for a trial (R. 119). As he "was known in Russia as an opponent to the Soviet government" (R. 115), it is obvious that a trip to Russia would have meant suicide. The same was true of Theophilus.

In the absence of the statute it would have been proper for the trial court to inquire into the validity of the interdicts.

> "• • • when civil rights as to property are involved the civil courts will insist that an accusation be made, that notice be given, and an opportunity to produce witnesses and defend be afforded, before they will give effect to an expulsion or suspension of the kind here attempted. Hoffman, Ecclesiastical Law, 276, 277."
>
> *West Koshkonong Cong.* v. *Ottesen*, 1891, 80 Wis. 62, 75.

See, also, *Jennings* v. *Scarborough*, 1894, 27 Vroom (56 N. J. L.) 401.

The implicit legislative determination, therefore, was proper and raised no federal question.

C. The invalidity of the policy of requiring "loyalty" from the American flock is a state matter.

Benjamin was unable to point out any canonical basis for this policy except the command of Jesus to give to Caesar what is Caesar's (R. 123). But Jesus did not command loyalty to two Caesars.

The statute implicitly finds that the "Church of American citizens" has been justified in refusing to give a pledge of "loyalty" to a foreign power as a condition of retaining enjoyment of their own accustomed shrines in New York.

This, again, is exclusively a state matter.

D. The validity of the American Church's position in rejecting all terms of reunion short of complete autonomy is a state matter.

By complete autonomy is meant self-government with only symbolical headship in the Patriarch.

Appellants (Ap. Br., p. 22) refer to certain suggested terms of reunion contained in the circular letter of the metropolitan council of July 10, 1945 (R. 217-218). However, these were never approved by the council of bishops and were never presented to the Patriarch. The terms which were actually presented to Metropolitan Gregory in 1947 were offered in evidence but objected to by appellants' counsel (R. 132-133). They provided for symbolical suzerainty only.

As Mr. Justice Van Voorhis said (Jurisd. Statement, pp. 100-101):

> "* * * The repeated efforts of these American communicants to achieve some tangible expression of their spiritual unity with believers in Russia, but without being subject to the formal functioning of the central church organization as a department of the Russian state, should count in their favor in this action. * * *"

The implicit finding of the legislature that the *Russian Church in America* has acted correctly in rejecting all terms of reunion short of complete autonomy, is vindicated by the recent actions of the Patriarchate. Metropolitan Nicholas of Krutitsk and Kolomen, the second hierarch of the Patriarchate (M. Br., p. 46), has been travelling about Europe, attending "peace" conferences and delivering himself of vituperative attacks on the United States (M. Br., pp. 122, 126, 128, 131, 137, 140, 143; *infra*, pp. 50-53; 56-63; 72-73; 75-77; 80). No epithets directed against this country are too outrageous to be published in the Patriarchate's official organ. So long as the Patriarchate is being utilized as an instrument of Soviet propaganda administrative connection between it and "a Church of American citizens" is inconceivable.

The implicit legislative finding in this respect is a state matter.

E. The validity of the organizational structure of the *Russian Church in America* is a state matter.

The statute makes explicit reference to the sobors of 1924, 1934 and 1937, to the metropolitan archbishop, council of bishops and metropolitan council, and to the governing statutes and normal parish statutes, of the *Russian Church in America*. The correctness of its organizational structure, in accordance with the enactments of the Moscow sobor of 1917-1918, the patriarchal ukase No. 362 and the resolutions of the Detroit sobor of 1924 (R. 187-188), is indisputable.

These are the "judicatories," and these are the canon laws, which are controlling, according to the legislative mandate. No federal question is involved.

F. The identification of the *Russian Church in America* with the *Old Diocese* is a state matter.

The erroneous statement of appellants (Ap. Br., p. 55) that the *Russian Church in America* "had belonged to a larger group" constituting the *Old Diocese*, has already been answered (M. Br., p. 55).

The legislature made an explicit finding on this subject (Rel. Corps. L. §105). It is a state matter.

G. The mandate that the properties included in the *Old Diocese* should be administered in accordance with the rules of the *Russian Church in America*, is a state matter.

This mandate inevitably follows from the findings of fact, explicit or implicit, undergirding the statute. As there is no federal question involved in any of the findings, so there is none involved in the mandate.

POINT III.

No federal question is involved in the award of possession to appellee.

A. The questions of (1) Where is the beneficial title to the Cathedral? (2) Who are the members of appellee? (3) For what purpose may the Cathedral be used? and (4) Who are the proper denominational governing authorities?—are all state matters.

(1) *Beneficial Title.* The full legal and beneficial title, as determined by the decisional law of the state (M. Br., p. 53), is in appellee. This is a state matter.

(2) *Membership of Appellee.* As determined by the decisional law of the state (M. Br., pp. 55-56), the members of St. Nicholas' Corporation were originally the mem-

bers of the parish congregation, subsequently the members of the *Old Diocese*.

As shown above (pp. 36-37, 41), the legislative indentification of the *Old Diocese* with the *Russian Church in America* was declaratory of the decisional law as expounded in the Yonkers Case, and is a state matter. The judgment appealed from in effect treats the membership of appellee as identical with the membership of the *Russian Church in America*—again a state matter.

(3) *Trust*[6] *Purpose.* The judgment appealed from also in effect directs the application of the Cathedral to a particular religious use which is either in accordance with the orignal trust purpose or as close to it (*cy près*) as circumstances will permit (M. Br., pp. 71-75). This matter concerns the state as *parens patriae* (*ibid.*, pp. 53-54) and raises no federal question.

(4) *Denominational authorities.* The judgment in effect designates the *Russian Church in America* as the proper controlling body. This conclusion necessarily follows from the application of the statute to the Cathedral. As all of the underlying determinations are state matters, so is this final result.

B. The award of possession to appellee does not violate the applicable "canon law."

"Canon law" is a broad term, covering statutes, codes, rules, regulations, decrees and decisions of ecclesiastical organs having legislative powers. In the field of faith (e.g. Nicene Creed), dogma, orders (e.g. Apostolic Succession), liturgy and ritual, concededly all Russian Orthodox faith-

[6] The distinction of property vested absolutely in a religious corporation from that held on a technical "trust" has already been pointed out (M. Br., pp. 53-54).

ful are bound by the same laws. But the "canon law" on which appellants lean so heavily is of a different character, viz.: administrative. They rely on two alleged rules: (1) the ruling bishop of the *"American Archdiocese"* is appointed[7] by the Patriarchate; (2) the ruler of the "American Archdiocese" has the prerogative of occupying the Cathedral. If by the term "American Archdiocese" appellants refer to the *New Patriarchal Diocese*, the first of these rules is irrelevant and the second begs the question which was passed on by the legislature to the contrary effect. Since, as a state matter, the legislature has found the *Russian Church in America* to be the successor of the *Old Diocese*, and has directed that the rules of the autonomous district should govern the administration of the properties which formed part of the *Old Diocese*, there is no conflict between the judgment and the applicable "canon law."

C. The judgment does not prohibit the free exercise of his religion by the "canonical archbishop."

As has been shown, the "canon law" determined by the legislature, as a state matter, to be applicable to the properties which formed part of the *Old Diocese*, is the body of administrative statutes adopted by the sobors of the *Russian Church in America* (Rel. Corps. L. §107). Pursuant to these statutes the "canonical archbishop" is elected by the American sobor. The judgment makes it possible for him to serve in the Cathedral and, conversely, makes it

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[7] Theoretically, since the *Old Diocese* was a full-fledged diocese, and not a mission (R. 11; 19), it was normally entitled to elect its ruling bishop, subject to confirmation by the Supreme Church Authority i.e. Patriarch, Synod and Supreme Church Council (R. 18-20). Probably, however, the democratic procedure envisaged by the enactments of 1917-1918 (M. Br., p. 11) was never put into actual practice within or without Russia. The trend of the present Patriarchate appears to be in the other direction (R. 245). The point is of no importance, as the *Old Diocese* has been succeeded

impossible for the patriarchal appointee to interfere with such ministry. No federal question is involved.

D. The statute, as applied in the case at bar, no more interferes in the internal affairs of a religious body than the judgment of any court which is called on to decide a dispute over the use of church property.

As has been seen (*supra*, p. 3), courts have been frequently appealed to in order to determine which faction of a religious body is entitled to control the use of property held on a religious "trust" (non-technical). These matters are determined by state law (*cf. Sims* v. *Greene*, 3 Circ., 160 F. 2d 512, 515). There is no intrusion into a forbidden field. If the courts refused to take jurisdiction, the administration of church properties would be in chaos: the peace and order of the state would be disturbed. No federal question is involved.

The same reasoning applies to a statute which lays down rules to be followed by the courts in a general class of church property cases likely to arise in the future.

E. The statute does not outlaw the patriarchal jurisdiction from the state.

Appellants grossly overstate the scope of the statute (Ap. Br., p. 33). The mandate of §107.1 and §107.3 applies only to religious corporations which (1) formed part of the *Old Diocese* before April 2-4, 1924, or came into the *Russian Church in America* after that date. The statute does not apply to any religious corporations which were founded with the intent of adhering to the *New Patriarchal Diocese* or came into that body from a source other than the *Russian Church in America*.

The Patriarchate is free to found or attract to its jurisdiction as many Russian Orthodox churches in New York as it can, provided they never formed part of the *Old*

Diocese or the *Russian Church in America*. How, then, can appellants charge that the statute outlaws the Patriarchate from the state? They themselves point to Article XV which expressly provides for the incorporation or reincorporation of religious societies which are foolish enough to stick their necks in the noose i. e. place themselves under the administrative jurisdiction of the Patriarch.

F. The canonicity of the *Russian Church in America* and its metropolitan archbishop is the concern of appellee, not of appellants.

Appellants attack the statute as directing "all Russian Orthodox churches to 'recognize' and subject themselves to the 'jurisdiction' of a bishop and a district whose canonicity, whose apostolic succession, they may hold in doubt" (Ap. Br. p. 34). This is the veriest nonsense. As pointed out above (p. 44), the mandate applies only to a certain class of churches. Appellants have failed to prove that there is a single religious corporation subject to the statute the members of which are not satisfied with the canonicity of the district and its metropolitan and are not happy to form part of the district. Appellants have no standing to raise imaginary doubts on behalf of imaginary churches.

The mandate of the statute, as applied below, operates on appellee and its trustees. So long as they are satisfied with the canonical state of affairs, appellants need not be concerned.

Incidently, the Archbishop of Constantinople and Ecumenical Patriarch, whose primacy of honor in the Eastern Orthodox communion is universally recognized, at his last mass in this country, invited a bishop of the *Russian Church in America* to con-celebrate with him—a recognition of full canonical status (N. Y. Times, January 24, 1949 as corrected in issue of January 25, 1949).

POINT IV.

The judgment may be sustained on state grounds.

In the appellate courts below the argument of counsel, both written and oral, dealt principally with the construction of the statute. Comparatively small space or time was devoted to a discussion of constitutionality. The opinions of Judges Conway and Froessel appear to be devoted mainly to a recital of the background of the statute as an aid to its construction.

Concededly, the judgment is based on the statute; and the court did purport to pass on a federal question; but it is submitted that the question was so insubstantial that it need not have been decided. This Court is not bound to accept the certificate of the Court of Appeals that the federal question was *necessarily* passed on. If this were not so the Court would be flooded with appeals on federal questions of no substance. Especially is this true of church property cases.

Conclusion.

The appeal should be dismissed or the judgment should be affirmed.

Respectfully submitted,

RALPH MONTGOMERY ARKUSH,
Counsel for Appellee.

APPENDIX A.

RELIGIOUS CORPORATIONS LAW

ARTICLE 5-C [New]

RUSSIAN ORTHODOX CHURCHES

Sec.

105. Definitions.

107. Government of incorporated Russian Orthodox churches; powers and duties of trustees.

Article added by L. 1945, c. 693, eff. April 10, 1945.

§105. Definitions.

The "Russian Church in America", as that term is used anywhere in this article, refers to that group of churches, cathedrals, chapels, congregations, societies, parishes, committees and other religious organizations of the Eastern Confession (Eastern Orthodox or Greek Catholic Church) which were known as (a) Russian American Mission of the Russian Orthodox Church from in or about seventeen hundred ninety-three to in or about eighteen hundred seventy; (b) Diocese of Alaska and the Aleutian Islands of the Russian Orthodox Church from in or about eighteen hundred seventy to in or about nineteen hundred four; (c) Diocese of North America and the Aleutian Islands (or Alaska) of the Russian Orthodox Church from in or about nineteen hundred four to in or about nineteen hundred twenty-four; and (d) Russian Orthodox Greek Catholic Church of North America since in or about nineteen hundred twenty-four; and were subject to the administrative jurisdiction of the Most Sacred Governing Synod in Moscow until in or about nineteen hundred seventeen, later the Patriarchate of Moscow, but now constitute an administratively autonomous metropolitan district created

pursuant to resolutions adopted at a general convention (sobor) of said district held at Detroit, Michigan, on or about or between April second to fourth, nineteen hundred twenty-four.

A "Russian Orthodox church", as that term is used anywhere in this article, is a church, cathedral, chaptel[1], congregation, society, parish, committee or other religious organization founded and established for the purpose and with the intent of adhering to, and being subject to the administrative jurisdiction of said mission, diocese or autonomous metropolitan district hereinabove defined as the Russian Church in America. Added L. 1945, c. 693; amended L. 1948, c. 711, §1, eff. March 31, 1948.

* * * * * *

§107. Government of incorporated Russian Orthodox churches; powers and duties of trustees.

1. Every Russian Orthodox church in this state, whether incorporated before or after the creation of said autonomous metropolitan district, and whether incorporated or reincorporated pursuant to this article or any other article of the religious corporations law, or any general or private law, shall recognize and be and remain subject to the jurisdiction and authority of the general convention (sobor), metropolitan archbishop or other primate or hierarch, the council of bishops, the metropolitan council and other governing bodies and authorities of the Russian Church in America, pursuant to the statutes for the government thereof adopted at a general convention (sobor) held in the city of New York on or about or between October fifth to eighth, nineteen hundred thirty-seven, and any amendments thereto and any other statutes or rules heretofore or hereafter adopted by a general convention (sobor) of the Russian Church in America and shall in all other respects conform to, maintain and follow the faith, doctrine, ritual, communion, discipline,

[1] So in original. Probably should read "chapel".

canon law, traditions and usages of the Eastern Confession (Eastern Orthodox or Greek Catholic Church):

* * * * * *

3. The trustees of every Russian Orthodox church shall have the custody and control of all temporalities and property, real and personal, belonging to such church and of the revenues therefrom and shall administer the same in accordance with the by-laws of such church, the normal statutes for parishes of the Russian Church in America approved at a general convention (sobor) thereof held at Cleveland, Ohio, on or about or between November twentieth to twenty-third, nineteen hundred thirty-four, and any amendments thereto and all other rules, statutes, regulations and usages of the Russian Church in America. Added L. 1945, c. 693; amended L. 1948, c. 711, §2, eff. March 31, 1948.

* * * * * *

APPENDIX B.

TRANSLATIONS OF EXTRACTS FROM ARTICLES PUBLISHED IN JOURNAL OF THE MOSCOW PATRIARCHATE.

No. 1, January, 1951.

The Orthodox Church and Peace

(p. 10)

. . . . . .

The Orthodox people also express their angry protest against the interference of one government into the internal affairs of another. For the purpose of seizing foreign lands, for the purpose of enslaving small nations, at the present time strong governments invade the boundaries of small nations. Swaggering in their strength, corrupted by insatiable enrichment at others' expense, the big business men of the U. S. A. have invaded small Korea and made themselves at home, considering neither the will of the people, nor their national dignity. Witness—the infringement of the rights of a small nation on the part of a strong government, led by a bunch of capitalists, thirsting for gain. . . .

PROF. N. DOKTOUSOV

No. 1, January, 1951.

A Great Service to the Cause of Peace

(In connection with the participation of the Metropolitan of Krutitsk and Kolomen, Nicholas, at the Second World Congress of the Partisans of Peace in Warsaw)

[November 16-22, 1950]

. . . . . .

(p. 12)

Underlining the fact of the union of peoples of different faiths, Metropolitan Nicholas revealed that inner stimulus

by which these people are moved in their noble battle against the instigators of war. "Not only the instinct of self-preservation," he said, "not the fear of another catastrophe was the moving force of these people in their desire to defend the cause of peace. No, we all know that their main stimulus was and is a desire of a high moral order, the desire to prevent the mass crime, which is any new aggression, bringing in its wake the destruction not only of the warring armies, but of the mass of the peaceful population, an example of which is the Korea of the present day."

In the indication of Metropolitan Nicholas of the "aspiration of a high moral character" as being the motive of the movement of the partisans of peace, there sounded a deep faith in the moral worth of people opposing the self-satisfaction and cruel egoism of the instigators of war. The latter, for the sake of their enrichment and rule, would like to exterminate all who interfere with their plans, while the former make it their aim to achieve a position under which the life of nations would not be subject to the danger of extermination. * * *

* * * * * * *

(p. 14)

* * * And Metropolitan Nicholas * * * had the right to say further to the delegates: "Appearing here before you, I speak not only as a citizen of my peace-loving Soviet power—I speak here as a bishop of the Russian Orthodox Church and in her name, with the awareness of the responsibility resting upon me for every word spoken before the God I profess, the Orthodox Church and history, and, as such, I want to be heard first of all by those who consider themselves Christians not in words, but in deeds".

As a citizen of the peace-loving Soviet power, Metropolitan Nicholas stood upon the height of loyalty to his terrestrial sovereign, which is the bulwark of peace in the entire world. As a bishop of the Russian Orthodox Church, he rose above all obstacles separating people, and with the solicitous eye of the sower looked from the ecclesiastical

heights at this boundless field, ready to receive in its deep furrows the seeds of love and peace. In the silence of profound attention it absorbed the good news of Metropolitan Nicholas as to the service of the Church in the cause of peace: "The Russian Orthodox Church," he said, "with the same unconditional decisiveness with which it rose to the defense of trampled native fields and desecrated holy places in the war against the Fatherland, from the very beginning of the threat of a new war, entered the ranks of the fighters for peace. The Russian Orthodox Church, guarding the foundations of the first Christian Church, sees in the service of peace one of the first of its problems".

. . . . . .

(p. 15)

Other Christians, like the Archbishop of Canterbury Geoffrey, justify their negative attitude toward the movement of the defenders of peace by the spiritual blindness of the latter to the Gospels, but, instead of serving for their enlightenment, hide behind a fence of atomic weapons. Such a departure from the Christian solution of the problem indicates nothing else than a shirking from participation in the historical progress by means of which humanity must come to the New Jerusalem. That same shirking may be the result of disbelief in the Gospels, for, speaking of the Christian world, based on love and mercy, certain Christians show no mercy whatsoever when their kinsmen destroy the peaceful population of Korea, and have no need of love whatsoever to oppress colonial peoples. . . .

. . . . . .

(pp. 17-18)

Further Metropolitan Nicholas turned to the Korean events, which have shown the anti-human together with the anti-Christian activity of the enemies of peace. "Is it possible", said Metropolitan Nicholas, "to listen calmly to the stories of witnesses as to what is going on in Korea, of the hangings, executions, dreadful tortures which are applied not only to prisoners, but to the peaceful popula-

tion as well—to children, the aged, women, the sick; of the thousands of bombs dropped on hospitals, orphanages, schools, of the flaming lava pouring from planes and burning cities, towns, farms, people? Is it possible without shuddering, deep pity and compassion for the incredible sufferings of a small peace-loving nation, to hear and read of that hell into which has been plunged a country of the oldest culture and good temper?".

To these two questions, dictated by the indignant Christian conscience of a representative of the Church, there was no need of an answer from the delegates of the World Congress of the Partisans of Peace, because they have gathered together, moved by the same protest against the inhumanity of the new "conquerors" of the world, and here, together with Metropolitan Nicholas, have experienced anew deep indignation at their humanity-hating ideology, expressed by the rector of an American university, Dr. Pence, who approved in print, bacteriological war, the use of gases, the atomic and hydrogen bomb and intercontinental rockets, repudiating any mercy in principle.

Such is the depth of human downfall that the basic, primordial human concepts become in it not only disfigured, but in the mouths of the fallen acquire a directly contrary meaning, according to which "murder is elevated to virtue, while the yearning for peace is called a crime". It is not surprising, therefore, that the camp of war begins to resemble an insane asylum, where feelings of fear and suspicion expose the utter doom of its inmates. Only by the firm will of hundreds of millions of people will be it possible to defend the world from their insane intentions.

Having exposed the enemies of peace, Metropolitan Nicholas contrasted their moral insolvency with the peaceable disposition of his own native land, which considers aggressive usurping wars to be a monstrous crime before humanity. "My country", said the Metropolitan, "does not intend to attack anyone, it wants to live in peace and to cooperate with all the countries of the world, regardless of their political and governmental structure".

A. VEDERNIKOV.

No. 1, January, 1951.

"Glory to God on High, and Peace on Earth, Goodwill to Men"

(pp. 26-27)

. . . . . .

However not only in the past, but actually before our eyes, it would seem that the most firm of peace treaties are crumbling, yesterday's allies become enemies. More than that, organizations, officially organized for the support of peace throughout the world, in the hands of instigators of war turn into weapons of bloody retribution over even completely peaceful populations: the aged, women, children.

. . . . . .

The attitude of the Russian Orthodox Church toward the new instigators of war is presented with exhaustive fullness in the speech of the Metropolitan of Krutitsk and Kolomen, Nicholas, at the First World Congress of the Partisans of Peace in Paris on April 22nd, 1949. "Charred ruins can still be seen," he said "in the cities of Russia and Western Europe, widows have not yet taken off their mourning for killed husbands, mothers still weep their lost sons and in secret hope for the miracle of their return, but new grave-diggers are already lighting their somber smoky lanterns. . . . Many of the kindlers of a new war consider and call themselves Christians. We, servers of the altar of the Orthodox Church, look with wonder at these attempts to cover with Christian, holy to us, evangelical slogans, manifestations of wickedness and satanic hatred. . . ."

V. Nikonov.

No. 2, February, 1951

The Trial of Faithfulness

(p. 140)

. . . . . .

And, despite inimical propaganda, Christians of all countries and faiths condemn the aggression of the Ameri-

cans in Korea, their cruelty in regard to the peaceful inhabitants of that country and their meaningless destruction of towns, cities and the fruit of the toil of a peaceful people. Australian priests have voiced a decisive protest against the cruel bombings to which Korea is being subjected, and have further noted that they protest, not because of political considerations, but because the governments of many countries—members of the United Nations Organization—consider themselves to be Christians.

• • • • • •

A. VEDERNIKOV.

No. 3, March, 1951.

The First Session of the World Council of Peace (p. 7)

Address of the World Council of Peace concerning the Conclusion of the Peace Pact

Responding to the desires of millions of people throughout the world, whatever be their opinion of the reasons, producing the danger of a world war;

in the name of the affirmation of peace and the guaranteeing of international safety;

we demand the conclusion of a Peace Pact between the five great powers—the United States of America, the Soviet Union, the Chinese National Republic, Great Britain and France.

We will regard the refusal of the government of any of the great powers to meet for the purpose of concluding the Peace Pact as bearing witness of the aggressive intentions of that government.

We call upon all the peace-loving countries to support the demand for the conclusion of the Peace Pact, open to all governments.

We place our signatures at the foot of this Address and call upon all people of good will and all organizations, desiring the affirmance of peace, to sign it.

Chairman Joliot-Curie (France), vice-chairmen: Pietro Nenni (Italy), Gabriel d'Arbousier (Black Africa), Bernal (England), Alexander Fadeev (USSR), Leopold Infeld (Poland), Go Mo Jo (China).

Thereafter follow the signatures of: Members of the Bureau; Secretaries and other Members of the World Council of Peace, including the signature of Nicholas, Metropolitan of Krutitsk and Kolomen, participants in the session invited by the World Council of Peace.

(The text of the Address appears in the newspaper "Izvestia" for February 27, 1951, No. 47).

No. 3, March, 1951.

Speech at the First Session of the World Council of Peace

(Berlin, February 23, 1951)

(pp. 15-21)

Dear friends of peace!

With agitation and with passion we speak here of the remilitarization of Germany and Japan, as well as of other questions on our agenda. • • •

Why is it not possible to speak of the remilitarization of Germany and Japan in quiet words? Because these actions of the kindlers of a new military conflagration bear witness to the aggressive war in preparation. For not one of the peoples thinks of attack upon Western Germany, upon Western Europe. Therefore, remilitarization—is war, is aggression.

• • • • • •

The simple people of the whole world thirst for a quiet life and peaceful toil. Here are the pictures appearing before their eyes. • • •

And how does the bunch of insane men, pushing the world towards a new martial catastrophe, see the near future? And what do these people live by now?

Unions and blocs, diplomatic slyness and secret agreements, miserable sops and military maneuvers. The curtailing of peacetime manufacture and the vast accumulation of military stores. Constantly increasing costs of living and the too heavy load of taxes. A golden stream for the insignificant minority and penury for the masses, material impoverishment and moral savagery. Scoffing beyond all bounds at human worth. Fear and hatred.

And what a monstrous incandescence of hatred! They breathe only hatred, feed only on hatred, only hatred is regurgitated by the transoceanic lords. Hatred not only towards those who consider their mongrel "philosophy" an achievement of the past, but also twoard those of "their own" who have merely dared to raise the timid voice of objection. The ceaseless police-cry at "ungrateful" Europe. Threats in the direction of the countries of the Peoples Democracy. And a completely frenzied, ferocious, boiling fury toward the peoples of the Soviet Union.

The great blasphemy, from the Christian point of view, is the fact that these people call themselves Christians. It does not fit into the bounds of reason and of conscience, how all these Trumans, Achesons and Dulles, returning home from their offices, where they have just been bending over the maps of future devastation and murder, put on black frock coats and in the circle of their families read the Bible!

One of the proposed forms of that warfare, which the world criminals are devising against free peoples, they grandly call a "preventive", a precautionary war. In actual fact this formulation simply expands into: "I suspect that you want to attack me, and therefore I attack you first".

This is worse than robbery on the open road. There, the victim, even poorly armed and if not just losing his head, can show opposition to the robber. While here the most base, the lowest form of attack is being prepared—from around the corner, the knife in the back.

Of what war are these people dreaming?

The last world war is before the eyes of all of us. All of us remember the horrors of fascism. * * *

* * * Together with all of the peace-loving humanity of the whole world the German people desire peace and defend it. They protest, together with all the simple and honest people of the whole world, against the remilitarization of Western Europe, being forcibly pressed upon it by American "benefactors", under whose heel the people of this Western Germany, as a representative from there has just clearly stated, fight for the liberty and unity, the indivisibility of their fatherland.

The German people itself damns fascism and nazism and with pain in its heart remembers the horrors of fascism in the last war.

But what? Only five years have gone by, and all humanity has become a witness of the repetition of that nightmare in the American aggression in Korea! It appears that, becoming aggressors, the gentlemen from the imperialistic camp repeat the evil deeds of their former enemies and even transcend them in many ways. Fanatic crimes, it appears—are not only the fruit of fascism and nazism, but they are the natural attributes of the imperialistic clique!

Hitler and his servants might well have envied General MacArthur and his fellow-champions in the Korean aggression.

Apparently, the bestial aspect of imperialism can change only in one direction—become still more ferocious, dreadful, merciless. Improving techniques only place in the hands of the executioners instruments of more refined torture and death.

* * * * * *

* * * if the dreadful happens, if on the arena of life there again bursts forth the beast of war—more than one woman in torment will clutch to her breast the headless corpse of her child * * *

Do we not already see this in Korea?

* * * * * *

We all know how on June 25, 1950, the hordes of the Korean American marionette—Li Sun Man, villainously fell upon the Peoples-Democratic Korean Republic, at the direction of their American masters. The painstaking elaboration of this, horrible in its baseness, act, is known.

It is known how the freedom-loving Korean people answered the bloody attack in one outburst. It is known how President Truman gave the order to the American armed forces in the Far East to come to the aid of his true ally—Li Sun Man.

It is known by what methods the United States of America influenced and [what methods it] uses to put through the UN the resolutions it desires.

The demagogic wails of American propagandists are known, with which they try to cover up the bestial grin of imperialism revealed to the whole world.

The march of military actions on the fronts of this long-suffering land is known. The boundless courage and heroism, with which an ancient people defends its independence and life before the hordes of contemporary savages, is known. What sympathy and condolence are called forth by the sufferings of the Korean people from all freedom-loving humanity, are known.

And there is also known one circumstance of the Korean events, and it is to this circumstance that I want to draw your attention. I have in mind the conduct of the war in Korea by the American aggressors.

When we turn to the official statements of the governmental workers of the Korean Peoples-Democratic Republic; when we listen to the evidence of war correspondents, journalists, up to now not known for the progressiveness of their opinions; when living people speak, who by some miracle have survived after the retreat of the army of occupation, or those who managed to escape from the leprous regions of the "new Americanized order"—we feel that which no document can transmit: we feel that depth of boundless, unassuageable grief into which modernized American monsters have plunged a noble people with its ancient culture.

And so we become convinced that the spirit and substance of fascism have not disappeared, that the delirious dreams of the fanatic Hitler have found their continuers, now trying to realize them.

Their followers do not lag behind their teachers.

From the first day of the lawless aggression the American neofascists began a systematic cannibalistic destruction of the "lower" Korean race.

What do we see?

Cynically violated standards not only of international rights, but of human morals. Executions without trial and inquisitions, secret and public. Dreadful tortures of victims: the cutting off of ears and noses, breasts, putting out of eyes, the breaking of arms and legs, the crucifixion of patriots, the burial alive in communal graves of women with children at their breasts, etc. The rebirth of the customs of savages—the scalping of Korean patriots for "souvenirs".

For the purpose of annihilating the population, the American criminals first of all fanatically killed the political prisoners (from 200,000 to 400,000 persons), forcing them first to dig their own graves; they threw the bodies of patriots [who had been] hung, shot or who died from typhus into a precipice and, to conceal the traces, blew up a cliff above it.

The barbaric bombings of peaceful cities and centers of population were directed exclusively toward the annihilation of the civil population.

In the committees of inquiry of the American troops we see the reborn "technique" of Himler, inhuman tortures of Korean patriots; hanging by the hands, binding [them] behind the back, which is impudently called "aeroplane"; welding handcuffs on the hands behind the back for 2-3 months; torture by electricity, including the electric bed, on which death follows the transmission of a strong current; a wet leather jacket which crushes the breast of the victim on drying; placing those ill of an epidemic sickness in cells filled to overflowing with prisoners.

These civilized savages arranged shooting matches with living targets, binding peasants to posts with barbed wire and shooting each of them over the heart of the target. Reviving the customs of the young-fascists, young-yankees photographed these scenes for their family albums and sent them home to their fiances and wives.

These representatives of the "higher" race practised and practise mass rape of the women and young girls of Korea, rounding them up from surrounding towns, making them drunk on gin and raping them. Not limited to outrages, the miserable victims were driven, in places, into tunnels, shot by machine-guns and buried under the debris of blown up cliffs.

Often one can see on the roads of Korea the still warm corpse of a mother and a crying child at her breast. Cases are known when children, born in prison, were trampled by the soldiers' boots in front of the mother, and then the mother was killed.

On retreating this "flower of culture" destroyed or drove off with it all living things on the evacuated lands.

On attacking, their fury was also vented first of all on the peaceful people.

Thus, on landing on September 15 in the Bay of Inchon everything breathing in the region was annihilated by insane forty-eight hour fire. Upon attacking Seoul in September of 1950 the same tactics of general destruction were continued.

In September of 1950, the French journalist Charles Farvel visited the camp of death, located in the "valley of horror" in Southern Korea. More than 300,000 Koreans are doomed to death in that camp. At that time there were 10 such camps. The camps are surrounded by barbed wire, along which run high voltage electric currents. The people live on the ground, they have neither clothing nor shoes. They are not fed, they eat grass and the bark of trees and bushes. American scientists and doctors, under the guise of giving medical assistance, test the newest vaccines and chemical preparations on the prisoners. Every night there are executions in the ravines surrounding the camps. To

be destroyed in the first order are the intelligentsia of the Korean people: doctors, teachers, engineers, technicians, agriculturists.

"I accuse!"—declared the Korean artist [a woman] Zoe Sin Hee—"The blood of thousands of infants, destroyed by the Americans, the tens of thousands tortured in the camps of death, the hundreds of thousands killed at the front, call for justice. The American military criminals must be severely punished for their evil deeds. I accuse them. I believe that the hour of retribution will soon arrive".

In retreating in January of 1951, the occupation forcibly chased more than two million peaceful inhabitants to the south of Korea, who died in thousands on the road and the roadside ditches from hunger and cold, from the bullets of the aggressors.

Those of the peaceful population of Northern Korea who remained alive or were dispersed among the camps expected hunger and epidemics. Even the notorious "UN Commission on the Unification and Reestablishment of Korea" in its letter to the UN of February 1, 1951, notes that 3,628 Koreans have been left without a roof in penury.

The Korean children are everywhere subject to the fury of the occupation. Everywhere, where the foot of the intervenors has stepped—in the province of Southern Pennyan, Northern Kengke, Southern Kengke, Kanko, Chang-Bong—the American bandits have destroyed the children.

And again one cannot dismiss the thought that the ideologists guiding the dreadful events in Korea consider themselves to be Christians, and not only Christian, but even leaders of Christian organizations! They know the Bible and often state so in the hearing of all!

And reason refuses to give an explanation of this nightmare, and the heart does not cease to tremble from feelings of holy hatred toward the cannibals, and the conscience of all simple people cries out against the evil deeds of the American aggressor!

Waves of protest and indignation against the American aggression in Korea and the evil deeds of the occupation;

against the attempts to loosen a new world war by means of blocs, pacts, the remilitarization of Germany and Japan; against the exploitation of the UN by the United States of America as a weapon of aggression—roll over the entire world. This indignation against the rulers who have lost their reason and will, dragging people towards the precipice, can be heard in numberless petitions, sent to parliaments and ministries. It is heard in the appearances of women and young people, going on in all the countries of the world. Protest and indignation is expressed by the many-thousand-strong crowds gathering in the town squares of Europe and demanding that the oversea world bandits and world colonizers in dress-coats and generals' tunics return home.

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And our holy duty, dear friends, is to tighten our ranks in the fight for peace, for the cessation of the bloody aggression in Korea, in the fight against the remilitarization of Western Germany and Japan, as a step towards a new war, against weapons for the mass annihilation of people, for the progressive curtailing of armament.

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METROPOLITAN NICHOLAS.

No. 4, April, 1951.

For the Berlin Session of the World Council of Peace Address of the Patriarch of Moscow and All Russia Alexy (p. 5)

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The Russian Orthodox Church, in complete agreement with the opinion of the members of the II World Congress of the defenders of peace, considers absolutely essential the outlawing of all forms of weapons of mass murder, atomic and bacteriological armament, the declaration as a war criminal of any who first uses them, the limitation of

armament and international control over it and the cessation of the bloody American aggression in Korea.

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No. 5, May, 1951.

Well-earned Reward

[Article relates the awarding of the Stalin prize for 1950 to seven outstanding members of the "democratic forces of different countries", among them Arthur Moulton, "former protestant bishop of the State of Utah in America" and Hewlett Johnson.]

(p. 22)

In affirmation of this truth H. Johnson contrasted the colossal expenditures of the United States of America for armament with the peaceful undertakings of the Soviet Union, occupied with raising the standard of living of its people; contrasted also the possession by the U. S. A. of 500 air bases, located thousands of miles from American shores and surrounding the Soviet Union in a ring, with the absence of Russian troops beyond the boundaries of Russian territory, excluding Austria and Germany, where they are by right, stipulated by agreements.

Having, further, disclosed the Marshall plan as an attempt of the U. S. A. to establish its rule in Europe, Dr. Johnson indicated the true sources of the martial threat and called upon the Western peoples to throw off the dollar chains in its prevention. "Then—he said—we shall see a united Germany . . . a united Europe . . . a free Korea, a China surrounded with respect and a united world—Eastern and Western, then we shall see peace throughout the world and the foundation of a true brotherhood".

By his numerous appearances in defense of peace, in defense of the unity of interests of simple people of all nations, the pastor of Canterbury Cathedral Dr. Johnson has acquired great influence on the popular masses of

England and other countries of Western Europe and Ameriea. It is no wonder that their governments are always trying to limit his propaganda activities, revealing their aggressive intentions. Therefore that satisfaction with which progressive circles of all countries greeted the award to Dr. Johnson of the Stalin peace prize can be clearly understood.

A. VEDERNIKOV.

No. 5, May, 1951.

Reflections on Truth and Falsehood

(For the First Session of the World Council of Peace)

(pp. 8-11)

"Falsehood is the infamous dishonor of man"
St. John Zlatoust.

No one likes to have his evil deeds revealed; no one wants his falsehoods discovered. That is exactly why the first session of the World Council for Peace was forbidden in Geneva.

Recently I said that the kindlers of war were ready to break the legs of those heralding peace. At that time it was only a metaphor. But on March 12, in Essen (Western Germany) actuality surpassed it. A hundred cruel people—automats of the "mobile police" spilled the blood of young men and women who had met to protest against war, splitting their heads with rubber truncheons. The myrmidons of the U. S. A., the revengers of Adenauer, had already begun to fight.

Why does the dreadful plaint rise to God of the destroyed peaceful Korean nation, and the blood flow in rivers, not only in Korea, but in Greece, Malaya, Vietnam?

Because the new idolators bring sacrifices to their idol—the golden Moloch, hetacombs of human bodies. But—what is still more unbearable—they dare to say that they do this in the name of the preservation of Christian culture.

* * * * * *

Christan culture is preserved by those who prove their love for peace by their pure deeds, who suffer for the sake of truth, and not by those who light the flame of hatred and force others to suffer indescribably. The worshippers of the golden calf write openly in their newspapers:

"Recourse can always be had to armament, if private business activity declines."

"As a result of war it is easy to create an atmosphere of war hysteria and, almost certainly, it will lead to vast appropriations for armament."

"When the nazis speak of peace, an economic catastrophe rises before the U. S. A.".

"The Korean war means more profit for the U. S. A., more automobiles, houses and provisions."

This is not "Soviet propaganda", this is an excerpt from a speech of the pastor of Canterbury Cathedral, Dr. Hewlett Johnson, at the Berlin session of the World Council of Peace.

Let us ask the newly arisen defenders of Christian culture will they dare, after the martial exploits in Korea, to ever send their missionaries to preach the Gospel of love to the people of As[illegible]frica and Australia, who will never forget their exemplary lessons of hatred, cruelty and black injustice?

In the dreadful clouds of smoke of burning Korean cities and towns we see many thousands of cruel and bestial people, direct performers of atrocities that cry to Heaven, led by American generals. Dreadful are the coldly cruel faces of the aviators, dropping death-dealing bombs on peaceful cities and towns, using machine guns on the fleeing crowds of old men and women with little children.

Why are these people, previously occupied in their own land with peaceful work, so dreadful now? Because they

have been thrown into the flame of fire and into oceans of blood. Because in the fight not for life, but unto death, men become bestial. But these very same men, when they have calmed down and come to their senses in the barracks for prisoners of war, send angry protests to their governments against the injustice of the war, against the falsehoods that have enmeshed them.

Let us turn our eyes to Lake Success, in whose halls the General Assembly of the United Nations Organizations sat so recently, and where now its general secretary administers its will.

Oh, what joyous hopes, in our naiveté, we laid on this organization upon its creation!

How passionately we expected truth and peace of it!

But, during the course of five years, from day to day, our hopes crumbled, and a torturous sadness for truth took possession of our hearts.

We awaited truth . . . —"and here are wails".

Awaited peace—"and here is bloodshed".

Oh, how disastrous and unbearable is the falsehood, pouring in streams from the hall of Lake Success, diabolic untruth, which reached its apogee in the declaration of China as an aggressor!

But honest people, stubborn in their belief in truth and justice, do not cease to send hundreds of thousands of letters of protest to the secretary of the UN and to the Safety Council; organize a great march to Washington.

The lie, dictated in the UN by the kindlers of war, is thrust upon their people by ten European governments and twenty governments of Latin America. It is sown by an army of conscientious journalists, ready for anything. It is accepted by credulous people and those easily frightened, as from them is hidden anything that might disprove the lie. We hold them blameless and are sincerely sorry.

The entire sea of humanity, populating the earth, is violently agitated. There has never yet been such a storm in its entire history. Its waves wash over the most remote and quiet corners of the globe. The negroes of Africa, New Guinea and the Papuans are driven to slaughter in

Korea and Malaya, because they can be driven, regardless of their will, as cows are driven to the slaughter-house. They are driven because the cultured Australians refuse to fight.

Oh, the poor people of the "lower races", who bother no one, who have no conception of Korea and Malaya, whose peaceful inhabitants they are ordered to kill!

What a black falsehood, what coercion, what evil!

Is everyone disturbed by this falsehood, does everyone's heart burn with indignation and with protest?

To our sorrow, not everyone's. But to the honor of humanity, it is only the minority, and an insignificant one at that. While the majority are honest, simple people. They are those 500,000,000 who signed the Stockholm Proclamation, and the many millions who would also have signed it, if they had not been persecuted and hunted for so doing. They are not only the "simple people", such as the dock-workers of France, Belgium, England, who refuse to unload ships with American armaments; in the ranks of honest people there are numbers of the highly cultured, such as teachers in American universities who appealed to Truman with a collective protest against armament and the militarization of Western Europe.

They are also the World Council—a vast force, now opposing the kindlers of war.

And the other great force, as has already been acknowledged by the world, is the deeply honest policy which is being conducted in the United Nations Organization and the Security Council by representatives of the U. S. S. R.

The shameful infidelity to their word of the governments, who signed the Atlantic and the Potsdam agreements, is contrasted by the changeless, majestic honesty and eternal faithfulness of our Government.

There are already martyrs for the truth of the protest against the war in preparation, young men and women languishing in prison, whose skulls were crushed in Essen, who defended their younger comrades with their bodies. There are heroes, such as the young Frenchwoman Raymonde Dehn, who lay down on the tracks to stop a train

with American armaments for Western Germany. Their names will not be forgotten.

All this is the unconquerable strength of truth, which is immeasurably greater than even the dreadful force of atomic bombs. By falsehood, that dire dishonor of humanity, and by atomic bombs, it perhaps is possible to drown truth in blood, for a while, but it is impossible to destroy it, for truth—is from God and therefore eternal.

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ARCHBISHOP LUKA.

No. 6, June, 1951.

On the Tenth Anniversary of the beginning of the Great Fatherland War

(pp. 11-13)

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The collection of contributions among the faithful—money, jewelry, warm clothing and underclothing—was a daily occurrence in the days of the war. Many clergy personally contributed money. And among the numerous telegrams of J. V. Stalin with greetings and thanks to groups of the faithful, their archpastors and pastors, there can be found many addressed by the head of the government to individual representatives of the Orthodox clergy.

Sometimes contributions were made for specific purposes—for tanks, aeroplanes. Upon a special appeal of Patriarch Sergius, money was collected for a tank column of the name of Dimitry Donskoy.

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Alas! Unfortunately the "conqueror-nations" proved unable to devote themselves to a longed-for peace and to completely transfer their energy to constructive toil. Bourgeois governments cherished other plans. A few years went by, and fascism, having woven its nest in another place, on another continent, beyond the ocean,

began again to openly show its monstrous claws. The conflagration of war, provoked by the imperialists, flared up in another part of the terrestrial globe—in Korea. And again the atrocities of licentious human-hatred shake the hearts of the people of all countries, who want to live not so as to profit, but so as to breathe freely and quietly, so as to build and create, to love, bring up their children, exhibit their capabilities and talents.

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* * * More than that, during these years there has not been a single declaration of J. V. Stalin in which he has not stressed the desire of the Soviet Union for peace, or has not indicated that now all the efforts of all nations must be directed into the struggle with the kindlers of war.

* * * In the central Soviet press, and on the pages of the church press, declarations and appeals appeared constantly from the Head of the Russian Orthodox Church, the Patriarch of Moscow and All Russia, to the entire Christian world and brotherly autocephalous Orthodox Churches, to raise their voices against all attempts and actions, directed toward the breaking of the peace, against the oncoming new manifestations of human hatred.

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The first call to peace was sounded in the days of the jubilee celebrations for the 500 years of the autocephaly of the Russian Orthodox Church. The appeal to the Christians of the entire world was unanimously adopted on July 17, 1948, by the Heads and Representatives of the Orthodox autocephalous Churches of: Russia, Antioch, Alexandria, Georgia, Serbia, Bulgaria, Roumania, Albania, Poland.

In this appeal the existing situation was clearly defined: "Let us not close our eyes, like the ostrich, in the face of the imminent manifestations of new human hatred, let us not stuff our ears to the mad roar of a new war. No one will dispute that the imperialists, great and small, the terrorists, the dictators and the haters of humanity of all kinds have

taken upon themselves the satanic roles of instigators and preparers of a new insane self-destruction, the finale of which will be the end of culture and the meaning of life".*

A. SHAPOVALOVA.

No. 7, July, 1951.

The Presentation of the International Stalin Prize to the English Social Worker, Prior of Canterbury Cathedral, Hewlett Johnson

(pp. 11-13)

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Speeches of welcome were made by the chairman of the Soviet Committee for the defense of peace N. S. Tikhonov, Professor I. E. Gloushenko and, in the name of the Russian Orthodox Church, Metropolitan Nicholas of Krutitsk and Kolomen.

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Speech of Hewlett Johnson

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In the USA peace is a forbidden word. Over there people are put in prison for organizing meetings of the partisans of peace. Magazines and radio in America speak of war, of the necessity of war. The entire economy of the USA depends on war or the preparation for war. Peace is an honorable word in the Soviet Union, peace is a forbidden word in the USA.

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* * * That word peace, which we preach, lives in the hearts of people fighting for peace. My people have taken that appeal close to their hearts. $150,000,000 which the USA has designated for its propaganda cannot hide the truth from my people. * * *

(TASS.)

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* "The Russian Orthodox Church in the Fight for Peace", Moscow 1950, p. 11.

No. 8, August, 1951.

Appeal to the Christians of the whole World.

(p. 3)

. . . . . .

Everyone knows how seriously strained the international situation has become, threatening the world with calamitous results. The dreadful conflagration of violent warfare in Korea has destroyed more than a million human lives and has completely ruined the welfare of the peaceful Korean people. A similar murderous storm is also gathering over other countries. It grows heavier by measure of how the aggressive governments—headed by the USA—arm themselves, dooming people to the woes of penury in the present and to destruction to a man in the future. The unheard-of weight of sorrows is already ready to crash down upon humanity.

. . . . . .

[Note: The above was signed at Moscow, on July 23, 1951, by the Patriarchs of Antioch, the Russian, Georgian, Roumanian and Bulgarian Orthodox Churches. Photostatic reproduction of signatures appears at end of appeal, which apparently was typewritten.]

No. 9, September, 1951.

Speech at the Meeting of the Soviet Committee for the Defense of Peace August 24, 1951.

(pp. 26-28).

. . . . . .

This new demand for peace calls forth hatred in the kindlers of a new war, the American imperialists, newly-risen pretenders to world domination. They dream of realizing that over which Hitler broke his neck: to turn the entire world into their colony, and all humanity into slaves of American millionaires and billionaires. They intend not only to liquidate the fruits of victory over fascism, but to plant the most somber reaction throughout the entire ter-

restrial globe. The entire policy of the Anglo-American aggressive bloc is directed towards this criminal purpose: and the bloody adventure in Korea, and the aggression against China, and the factual occupation by American troops of a series of European countries, and the turning fascist of the internal life of the USA and of other capitalistic governments.

The kindlers of war do not calm down, continuing the feverish race for rearmaments. The merchants of death squeeze the last drops from countries in their power, doom peoples to destruction and famine.

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METROPOLITAN NICHOLAS.

No. 9, September, 1951.

Announcement of the Patriarch of Antioch and the entire East

(pp. 4-6)

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Patriarch Alexander III made the following statement to the press:

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"I am sincerely glad that the Antioch Orthodox Church is also taking an active part in this great and holy cause, as war is the infringement of the fundamentals of Christian morality, calamity and a burden for simple people in the name of the enrichment of those few who own factories for the manufacture of the weapons of war, in the name of the attempt of the USA to achieve world domination.

During my recent trip to Greece I became convinced that the Orthodox Church in that country, which yearly receives alms from Americans, will not come forward in the cause of peace.

I am convinced that personally the Ecumenical Patriarch Athenagoras desires peace but he will never say so,

for he received the patriarchal throne with the aid of American governing circles.

Nor will he come forward against the Vatican—one of the initiators of the new war, as his "friend" Truman is a friend of Pope Pius XII.

There are also attempts on the part of representatives of England and the USA in Syria and the Levant to tear apart the ancient love between the churches of Antioch and Moscow in the name of their aims, inimical to the Soviet Union."

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(Tass).

"Izvestia", August 25, 1951, No. 199

No. 11, November, 1951.

Speech at the Georgian Republican Conference of the Partisans of Peace in Tbiliss—September 19, 1951. (pp. 26-27)

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Everyone knows that the Anglo-American imperialists are feverishly preparing a new world war, but there is no doubt that the people of good will of the entire world will destroy the attempts of the kindlers of war. • • •

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• • • Is it possible to call Christians those western neighbors, who, considering themselves to be the guides of the blind, light for those in darkness, preceptors of the ignorant and teachers of infants, at the same time sell poisoned products, prepare for an atomic bombardment of the world, in Korea kill infants, women and the aged, destroy all life (even plant life).

Can the Georgian Church, even for a minute, be reconciled with that barbarous event which took place recently in Korea: flood victims sought refuge on the roofs of houses and in the branches of trees, and these unfortunates had

bombs dropped on them from above. [Let us keep] far away, far away from such Christians. They are wolves in sheep's clothing, while our socialistic country always was and is a country that defends the oppressed, a country of fighters for peace, a defender-country of the interests of the toilers of the entire world.

Therefore the Georgian Orthodox Church, with all the people of good will and with all the peoples of the Soviet Union, demands the conclusion of a Peace Pact between the five great powers—the Soviet Union, the United States of America, the Chinese Peoples Republic, Great Britain and the French Republic.

Despite the fact that the kindlers of war desire to draw the peoples of the world into the horrors of war—the forces of the partisans of peace daily grow stronger and increase in number.

Peace will conquer war, for the cause of peace is guided by the wise Leader of the people, the great standard-bearer of peace Joseph Vissarionovich *Stalin!*

KALLISTRAT, CATHOLICOS-PATRIARCH
OF ALL GEORGIA.

No. 11, November, 1951.

Let us Intensify the Struggle!

Speech at the Second Session of the World Council of Peace
(Vienna, November 5, 1951)

(pp. 30-31)

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The resolution, known to us all, of the Bureau of the World Council of Peace, taken at the last meeting of the Bureau in Helsinki, speaks with convincing clarity of the danger, hanging over the world, and of the necessity of intensifying the struggle against the instigators of a new war.

The resolution indicates that the ceaseless and bloody war, lasting for a whole year, in Korea, which has destroyed

the country to its foundations and destroyed more than a million human lives, brought no positive results for the intervenors. The resolution contrasts this fact with that tremendous response throughout the world which was called forth by the first news of the initiation of the cessation of military activity in Korea.

Actually, is it not clear that if a mighty power, which has thrown into the "operation" vast material and human reserves, could not conquer a small country in the course of so long a time; if the people of that country not only survived the most grievous, dreadful torments, but, supported by the sympathy of all honest humanity in this struggle for what is right for it, draw new strength for opposition to the foreign-invaders—is it not clear that the continuation of this criminal adventure will call forth only new hatred and cruelty; that new torrents of flame and iron will be poured into the bottomless pit, new tens and hundreds of thousands of human lives, to human sorrow and the joy of only an insignificant bunch of the manufacturers of death? And is it not apparent that the most natural way out of this destructive situation—is to stop the war, take all the foreign armies out of the long-suffering country and let the home-owners settle their own quarrels? The slogan of all freedom-loving humanity has not lost its force: hands off Korea!

And where does this insane contest to turn as much government money, and as quickly as possible, into weapons of destruction come from? This race, as its initiators affirm, bears a "peaceful", defensive character and is directed against the danger, which it would seem threatens "Christian civilization" on the part of the Soviet Union and the countries of the peoples democracy. . . .

The resolution reveals the hearth of a new war danger, growing in the remilitarization of Japan and Western Germany. . . .

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. . . The masses of the people throughout the world full of stern resolution, speak in the words of the great

singer Paul Robeson, to put the shirts of peace on the generals and diplomats, inflaming the danger of war.

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Having lost their right minds and free of conscience, the torch-bearers of a new war say that, to quote, there is no need of a Peace Pact because the UN is fully competent to settle all acute and controversial international problems. What pitiable prattle! Has the UN in the very least justified the hopes laid down on it by all humanity, as being an organization for the peace and safety of peoples? And can a country of 475,000,000 population, which has realized ancient national hopes, has found the solid forms of new social relations and is already long occupied with constructive fruitful labor, be deprived of participation in international life?

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METROPOLITAN NICHOLAS.

No. 12, December, 1951.

Let us Defend the Cause of Peace

An address of the third All-Union Conference of the Partisans of Peace to all the Participants of the Movement in the Defense of Peace in all Countries

(pp. 15-16)

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The Soviet people insistently fight for peace because they consider an aggressive war to be a most grievous crime before humanity, the greatest misfortune for the simple people of the world. More than 117,000,000 Soviet citizens, who signed the Address of the World Council of Peace for the Conclusion of a Peace Pact, have announced that they wish to live in peace and friendship with the people of the USA, England, France and all the other countries of the world.

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The Soviet people warmly approve and unanimously support the peace-loving external policy of the Soviet government, which has repeatedly stated that it considers possible the peaceful existence of governments with different economic systems and idealogies.

We are not afraid of peaceful competition with capitalism, but neither are we afraid of the intrigues of imperialistic aggressors. There is no such force in the world as could force our people to swerve from the way of a constructive communistic society.

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Millions of Soviet people share the worry of simple people in all countries in connection with the threat of a new world war, for which thirst the frantic reactionaries and financial magnates, in the first place the American and English. In war they see the main source of enrichment, of the receipt of colossal super-profits. For almost a year and a half now the ruling circles of the USA lead a grasping, devasting war against the freedom-loving Korean people. Having boldly trampled on all previously concluded international agreements, the American reactionaries enlarge the aggressive Atlantic bloc, create new military bases in all parts of the world and feverishly intensify the race for armament and preparation for war with the application of atomic weapons. For these purposes they turn the United Nations organization into an instrument of war, revive Japanese and German militarism. The American reactionary press and radio from day to day conduct a licentious, lying anti-Soviet propaganda, trying to kindle enmity toward the Soviet Union, the Chinese National Republic and the countries of the people's democracy. The people of the countries in the Atlantic bloc are suffocating under the load of military budgets, taxes and expensiveness.

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No. 12, December, 1951.

Speech at the Third World Conference of the Partisans of Peace

(pp. 18-19)

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Everyone knows that at the time that American millionaires and billionaires intensely prepare a new war—the Soviet Union carries on the construction of gigantic hydro-electric stations, dries out swamps, irrigates deserts and makes fertile every bit of land by its kindly and free toil.

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Contempt and holy hatred are evoked in our days by the fascistic dispositions of American imperialists and their dreadful moral appearance.

In their desire for world dominance the American aggressors carry on a war against the people of the East. The earth of freedom-loving Korea is flooded with blood, thousands of sons and daughters of the heroic Korean people are tortured to death. The will and freedom of the people of Vietnam and Malaya are being cruelly suppressed. The so-called "Atlantic bloc" is being built, directed against the peace-loving Soviet Union and the countries of the national democracy. Piracy, robbery, provocation, the oppression of small peoples, ridicule of humanity and democracy—are the "symbols of faith" of Anglo-American imperialism.

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But if anyone should take it into one's head to force a many-millioned and many-nationed population, welded into a monolith, to take up arms, then let him know that we know not only how to fight, but also how to conquer. The history of the last decades serves as an indication. It cannot be otherwise.

The cause of peace will triumph, for the movement for peace is guided by the great champion and standard-bearer of peace—Joseph Vassarionovich Stalin.

KALLISTRAT, CATHOLICOS—PATRIARCH OF ALL GEORGIA.

No. 12, December, 1951.

Second Session of the World Council of Peace

(pp. 20-21)

Everyone knows that the kindlers of war in Washington and London and their satellites do not cease the insane preparations for a new world war for a day. Almost every week the American Senate designates supplemental funds for armament, for the putting together of an aggressive army. American generals ceaselessly run about the world. American aggressors continue to wage a war of extermination in Korea. They build military bases around the Soviet Union and the countries of the peoples democracy.

Not for one day, in the countries of capital, does war propaganda stop. War hysteria in the USA has reached its apogee, there everything is directed to the service of war.

The ideas of hatred of humanity are innoculated in children and young people on a broad scale in the USA. And here is what such an education by cannibals leads to: "At one of my lessons on social science—tells one of the progressively inclined teachers of the USA—a pupil asked: 'Why did we not drop an atomic bomb immediately on the Soviet Union?' Before I had time to answer anything, another student added: 'But the Russians—they are not people'".

It is thus that the American kindlers of war try to raise murderers from their tender years. Thus the enemies of peace desire to corrupt the minds of people and force them to be submissive participants in unheard-of evil deeds against humanity.

METROPOLITAN NICHOLAS.

APPENDIX C.

SELECTED CASES ON CHURCH PROPERTY

Malone v. *Lacroix*, 1904, 143 Ala. 657; *Gewin* v. *Mt. Pilgrim Baptist Church*, 1909, 166 Ala. 345; *Dismukes* v. *S. ex rel. Hill*, 1912, 176 Ala. 616; *Mitchell* v. *Church of Christ at Mt. Olive*, 1930, 221 Ala. 315; *Guin* v. *Johnson*, 1935, 230 Ala. 427.

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